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## Understanding Pleading Doctrine

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# UNDERSTANDING PLEADING DOCTRINE†

A. Benjamin Spencer\*

*Where does pleading doctrine, at the federal level, stand today? The Supreme Court's revision of general pleading standards in *Bell Atlantic Corp. v. Twombly* has not left courts and litigants with a clear or precise understanding of what it takes to state a claim that can survive a motion to dismiss. Claimants are required to show "plausible entitlement to relief" by offering enough facts "to raise a right to relief above the speculative level." Translating those admonitions into predictable and consistent guidelines has proven illusory. This Article proposes a descriptive theory that explains the fundamentals of contemporary pleading doctrine in a way that gives it some of the clarity and precision it otherwise lacks. The major descriptive thesis posited here is that the central animating principle of contemporary pleading doctrine is the requirement that a complaint—through the use of objective facts and supported implications—describe events about which there is a presumption of impropriety. Getting to that presumption requires different degrees of factual specificity depending on the factual and legal context of the claim. A secondary descriptive claim is that the doctrine in its current iteration privileges efficiency interests over the justice-related concerns of accuracy and procedural fairness. Unfortunately, this preference unduly harms the right of access to courts for those plaintiffs having claims that require the pleading of information they do not or cannot know. Further, it may be that certain types of claims, such as civil rights and antitrust claims, are more disadvantaged by this preference than others, suggesting that the doctrine needs to be recalibrated to better serve the interests of justice more evenly across different types of cases.*

## TABLE OF CONTENTS

INTRODUCTION .....	2
I. THE NEED FOR A DESCRIPTIVE THEORY OF PLEADING .....	6
A. A Lack of Clarity .....	6

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B. <i>A Lack of Precision</i> .....	9
C. <i>Approaching the Theory</i> .....	11
II. A PRESUMPTION-BASED THEORY OF PLEADING.....	13
III. THE VALUES OF PLEADING.....	18
A. <i>Notice</i> .....	19
B. <i>Efficiency</i> .....	21
C. <i>Justice</i> .....	23
IV. EVALUATING PLEADING DOCTRINE.....	26
A. <i>Balancing Efficiency and Justice</i> .....	26
B. <i>Pleading and Context</i> .....	32
CONCLUSION .....	36

## INTRODUCTION

Access to justice is a cornerstone principle of our democracy. Vital to that principle is our civil justice system and the ease with which those who have been aggrieved are able to seek relief from the federal courts. Prior to the advent of the Federal Rules of Civil Procedure in 1938, history had not been kind to those pressing their claims, with difficult and often insurmountable pleading standards characterizing the gate through which claimants had to pass to gain entry into the judicial system.<sup>1</sup> The Federal Rules ushered in a new era of open access for plaintiffs by casting aside complicated fact-pleading regimes in favor of simplified pleading<sup>2</sup> and broad discovery.<sup>3</sup> The idea was that decisions should be rooted in the merits, something not promoted, it was thought, through pleadings-based dispositions of matters before discovery could ensue.

As the liberality of the Federal Rules combined with the proliferation of public-rights legislation beginning in the 1960s<sup>4</sup> and with reforms that made

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1. See generally Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909 (1987) (discussing the history of common law and code pleading).

2. See FED. R. CIV. P. 8(a)(2) (requiring the pleading of "a short and plain statement of the claim showing that the pleader is entitled to relief").

3. See FED. R. CIV. P. 26(b)(1) (entitling litigants to discovery of "any nonprivileged matter that is relevant to any party's claim or defense").

4. Abram Chayes long ago discussed the advent of litigation involving the rights developed in public-rights legislation:

Perhaps the dominating characteristic of modern federal litigation is that lawsuits do not arise out of disputes between private parties about private rights. Instead, the object of litigation is the vindication of constitutional or statutory policies.

...

... School desegregation, employment discrimination, and prisoners' or inmates' rights cases come readily to mind as avatars of this new form of litigation. But it would be mistaken to suppose that it is confined to these areas. Antitrust, securities fraud and other aspects of the conduct of corporate business, bankruptcy and reorganizations, union governance, consumer fraud, housing discrimination, electoral reapportionment, environmental management—cases in all these fields display in varying degrees the features of public law litigation.

class actions a tool that more litigants could use,<sup>5</sup> there was a perception that the federal courts were being flooded with a level of claims—some with merit but many without—that it increasingly could not efficiently handle.<sup>6</sup> Over time, courts began turning to pleading standards as a means of stemming the tide of claims and separating the wheat from the chaff.<sup>7</sup> Though the Supreme Court had indicated that Rule 8 required only simple notice pleading with no need for factual detail,<sup>8</sup> lower federal courts developed and imposed their own more stringent pleading standards for certain claims that

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Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1284 (1976).

5. Rule 23, which governs class actions in the federal system, was amended in 1966. One of the most significant changes was the creation of Rule 23(b)(3), which liberalized class actions by authorizing them when the court finds that “the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.” FED. R. CIV. P. 23(b)(3). The Advisory Committee acknowledged that the justification for permitting class actions under such circumstances was questionable when it wrote, “In the situations to which this subdivision relates, class-action treatment is not as clearly called for as in those described above . . . .” FED. R. CIV. P. 23(b)(3) advisory committee’s note (1966). Nevertheless, these so-called “opt-out” class actions have come to dominate class-action practice at the federal level. See Thomas E. Willging et al., *An Empirical Analysis of Rule 23 to Address the Rulemaking Challenges*, 71 N.Y.U. L. REV. 74, 94 (1996) (“Of the 138 certified classes for which information was available, eighty-four (61 percent) were (b)(3) classes, forty (29 percent) were (b)(2) classes, and the remaining fourteen (10 percent) reflected an equal number of (b)(1)(A) and (b)(1)(B) classes.”).

6. The debate over whether this perception matched reality has been ongoing for decades. See, e.g., Marc Galanter, *The Day After the Litigation Explosion*, 46 MD. L. REV. 3, 7 (1986) (“[The] evidence of current American litigation rates does not suggest that rates of civil court filings are dramatically higher than in the recent past. Nor is it the case that American rates are unmatched in other industrial countries.”); Arthur R. Miller, *The Pretrial Rush to Judgment: Are the “Litigation Explosion,” “Liability Crisis,” and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. REV. 982, 996 (2003) (“The foregoing shows that the supposed litigation crisis is the product of assumption; that reliable empirical data is in short supply; and that data exist that support any proposition. Thus, one should be cautious and refrain from trumpeting conclusions on the subject lest it distract us from serious inquiry.”); Jack B. Weinstein, *After Fifty Years of the Federal Rules of Civil Procedure: Are the Barriers to Justice Being Raised?*, 137 U. PA. L. REV. 1901, 1907–09 (1989) (“Modern critics like Judges Bork and Posner and Justice Scalia say a ‘litigation explosion’ has taken place since 1960 . . . . The truth about the ‘litigation explosion’ is that it is a weapon of perception, not substance. If the public can be persuaded that there is a litigation crisis, it may support efforts to cut back on litigation access.”).

7. See Christopher M. Fairman, *Heightened Pleading*, 81 TEX. L. REV. 551, 577–82 (2002) (chronicling the rise of heightened pleading). There were also changes to the Federal Rules designed to give courts more authority to forestall seemingly frivolous litigation. See FED. R. CIV. P. 16 advisory committee’s note (1983). The advisory note explained:

Given the significant changes in federal civil litigation since 1938 that are not reflected in Rule 16, it has been extensively rewritten and expanded to meet the challenges of modern litigation. Empirical studies reveal that when a trial judge intervenes personally at an early stage to assume judicial control over a case and to schedule dates for completion by the parties of the principal pretrial steps, the case is disposed of by settlement or trial more efficiently and with less cost and delay than when the parties are left to their own devices.

*Id.*; see also FED. R. CIV. P. 11 advisory committee’s note (1983) (“Experience shows that in practice Rule 11 has not been effective in deterring abuses. . . . The amended rule attempts to deal with the problem by building upon and expanding the equitable doctrine permitting the court to award expenses, including attorney’s fees, to a litigant whose opponent acts in bad faith in instituting or conducting litigation.”).

8. *Conley v. Gibson*, 355 U.S. 41, 47 (1957).

required increased levels of factual detail before such claims would be permitted to proceed to discovery.<sup>9</sup> On occasion, the Supreme Court chided the lower courts for this activity,<sup>10</sup> but never to an extent sufficient to quell selective imposition of these heightened pleading standards completely.<sup>11</sup>

Judicial inclination toward stricter pleading standards ultimately took hold among a majority of the Supreme Court itself when, in 2007, the Supreme Court decidedly revised its previous understanding of the nature of one's pleading obligation under the Federal Rules in *Bell Atlantic Corp. v. Twombly*,<sup>12</sup> a revision that has been affirmed and solidified by the Court's more recent decision in *Ashcroft v. Iqbal*.<sup>13</sup> In *Twombly*, the Court reinterpreted Rule 8 as requiring allegations that show a plausible entitlement to relief, a feat accomplished by offering substantiating facts that move liability from a speculative possibility to something that discovery is reasonably likely to confirm.<sup>14</sup> Although some commentators<sup>15</sup> and the Court itself<sup>16</sup> would perhaps deny it, *Twombly* appeared to be a departure from the simple "notice" pleading standard announced in *Conley v. Gibson*<sup>17</sup> and reaffirmed most notably in *Leatherman v. Tarrant County Narcotics Unit*<sup>18</sup> and *Swierkiewicz v. Sorema*.<sup>19</sup> Under notice pleading, courts were prohibited—at least so far as the Supreme Court had been concerned—from dismissing a claim

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9. For a compilation of examples of this practice, see Christopher M. Fairman, *The Myth of Notice Pleading*, 45 ARIZ. L. REV. 987, 1011–59 (2003) (discussing the heightened pleading standards imposed among the circuits for various types of claims, including antitrust, civil rights, RICO, conspiracy, and defamation claims).

10. See, e.g., *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 507 (2002) ("Imposing the Second Circuit's heightened standard conflicts with Rule 8(a)'s express language, which requires simply that the complaint 'give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests.'" (quoting *Conley*, 355 U.S. at 47)); *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993) ("We think that it is impossible to square the 'heightened pleading standard' applied by the Fifth Circuit in this case with the liberal system of 'notice pleading' set up by the Federal Rules.").

11. The Court's statements regarding the requisites of simple "notice" pleading have not always been consistently or clearly supportive of a wide-open, liberal approach. In *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336 (2005), the Court repeated its loyalty to the notice-pleading concept but went on to hold that notice required the plaintiff in a securities fraud case to plead more specific information regarding "the loss and the causal connection that the plaintiff has in mind." *Id.* at 347.

12. 550 U.S. 544, 554–55, 560–61 (2007).

13. 129 S. Ct. 1937 (2009).

14. 550 U.S. at 555–56.

15. See, e.g., Keith Bradley, *Pleading Standards Should Not Change After Bell Atlantic v. Twombly*, 102 NW. U. L. REV. COLLOQUY 117, 117 (2007) ("*Twombly* changed antitrust law by modifying the elements of an antitrust conspiracy claim, but did not rework pleading rules across the board.").

16. See *Erickson v. Pardus*, 551 U.S. 89, 93 (2007) (per curiam) ("Federal Rule of Civil Procedure 8(a)(2) requires only 'a short and plain statement of the claim showing that the pleader is entitled to relief.' Specific facts are not necessary; the statement need only 'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'").

17. 355 U.S. 41, 47 (1957).

18. 507 U.S. 163, 167–68 (1993).

19. 534 U.S. 506, 507 (2002).

unless it was clear that there was “no set of facts” that the plaintiff could prove to establish the claim.<sup>20</sup> It was this “no set of facts” language from *Conley* that the *Twombly* Court abrogated as it articulated its new vision of what pleading under Rule 8(a) requires.<sup>21</sup>

In previous writings I have set forth my understanding of the meaning of *Twombly*,<sup>22</sup> explained why I feel that the Court’s pronouncements in the case were misguided,<sup>23</sup> and chronicled lower-court reaction to and application of *Twombly*’s standards to civil rights claims.<sup>24</sup> In this latest installment of my ongoing project to understand federal civil pleading standards, I turn to an effort to engage in a systematic analysis of contemporary pleading doctrine that will hopefully yield a comprehensive theoretical description of its fundamental components and underlying rationale.

Although *Twombly* and *Iqbal* do not by themselves supply all one needs to know about pleading doctrine today, the decisions—by largely ratifying the heretofore renegade practice of imposing fact-pleading requirements—have brought together theory and practice in a way that enables a unified analysis of pleading doctrine as stated and the doctrine as applied that will be free of the internal inconsistencies that characterized the pre-*Twombly* pleading world. In other words, by bringing fact pleading out of the shadows and giving it its imprimatur, the Supreme Court has made it possible now to discuss pleading doctrine without having to contend with the pesky contradictions between the Court’s previously high-minded rhetoric about notice pleading and the reality on the ground of particularized pleading. Thus, the merger of rhetoric with reality that *Twombly* (and *Iqbal*) accomplished gives us an occasion to assess the precise character, structure, and purpose of pleading doctrine within the federal system as a whole.

The discussion below proceeds as follows: Part I outlines the need for a descriptive theory of pleading, which, in brief, is rooted in the need to give some practical meaning to the broad and confusing pronouncements of *Twombly* and to develop an explanation for the level of factual detail a complaint will require in any given substantive legal context. Part II presents the descriptive theory, which holds that the central defining principle of contemporary pleading doctrine is the requirement that a complaint—through the use of objective facts and supported implications<sup>25</sup>—describe events about which there is a *presumption of impropriety*. Getting to that presumption requires different degrees of factual specificity depending on the factual and legal context of the claim. Part III seeks to uncover the core value or values that animate pleading doctrine, focusing on the values of notice,

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20. *Conley*, 355 U.S. at 45–46.

21. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 562 (2007).

22. A. Benjamin Spencer, *Plausibility Pleading*, 49 B.C. L. REV. 431 (2008).

23. *Id.*

24. A. Benjamin Spencer, *Pleading Civil Rights Claims in the Post-Conley Era*, 52 How. L.J. 99 (2008) [hereinafter Spencer, *Pleading Civil Rights Claims*].

25. I define these terms in Part III below.

efficiency, and justice. Part IV evaluates the doctrine as clarified by the descriptive theory, focusing on its imbalance with respect to vindicating the concerns of efficiency over justice and the consequent disadvantaging of certain types of claims.

## I. THE NEED FOR A DESCRIPTIVE THEORY OF PLEADING

The pleading doctrine that emanates from *Twombly* suffers from two defects that hamper courts and litigants in their efforts to understand and apply it. First, the *Twombly* opinion was insufficiently clear regarding whether notice pleading survives the decision, the extent to which facts are now required in pleadings, and the nature and vitality of the requirement to accept nonmovants' factual allegations as true in the face of a motion to dismiss. Second, the doctrinal signals flowing from *Twombly* are too imprecise and subjective to facilitate the proper and consistent application of pleading requirements across jurisdictions. After reviewing these clarity and precision problems, this Part will lay the groundwork for approaching a theory of pleading that can give greater definition to what *Twombly* and the relevant provisions within the Federal Rules require of litigants asserting claims.

### A. A Lack of Clarity

A central question in the wake of *Twombly* is whether so-called notice pleading survived the decision. Unfortunately, the Court's own inconsistent rhetoric has been responsible in large part for a lack of clarity on this issue.<sup>26</sup> For instance, the *Twombly* Court affirmed that "a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations,"<sup>27</sup> but then wrote that "[f]actual allegations must be enough to raise a right to relief above the speculative level"<sup>28</sup> and "a complaint must allege facts suggestive of illegal conduct."<sup>29</sup> Although requiring the pleading of suggestive facts seems akin to particularized fact pleading of the kind previously thought not compelled by Rule 8, the Court sought to assure readers that "we do not require heightened fact pleading of specifics."<sup>30</sup> Subsequently (merely a couple of weeks later), in *Erickson v. Pardus*<sup>31</sup> the Court wrote that under Rule 8 "[s]pecific facts are not necessary; the statement need only 'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'"<sup>32</sup> That is easy to say, but the notion that all a complaint needs to do is provide fair notice hardly rests comfortably with the Court's

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26. It might be said that *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009), provides a bit more clarity on the matter, since the majority there makes no mention of the notice-pleading concept at all.

27. *Twombly*, 550 U.S. at 555.

28. *Id.*

29. *Id.* at 564 n.8.

30. *Id.* at 570.

31. 551 U.S. 89 (2007) (per curiam).

32. *Id.* at 93 (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)).

clear command that the complaint must also demonstrate plausible entitlement to relief, a task that will be difficult to accomplish in many cases without the type of factual detail the Court claims to be unnecessary.

Lower courts have been confused by these mixed signals,<sup>33</sup> causing them to reach varying conclusions about whether notice pleading remains or has been supplanted by something new. The Third Circuit gave voice to this confusion:

What makes *Twombly*'s impact on the Rule 12(b)(6) standard initially so confusing is that it introduces a new "plausibility" paradigm for evaluating the sufficiency of complaints. At the same time, however, the Supreme Court never said that it intended a drastic change in the law, and indeed strove to convey the opposite impression; even in rejecting *Conley*'s "no set of facts" language, the Court does not appear to have believed that it was really changing the Rule 8 or Rule 12(b)(6) framework.<sup>34</sup>

As further testament to this confusion, there are also courts that flatly indicate that heightened pleading is now required, looking past the Supreme Court's statements disavowing such pleading to the reality of what the plausibility standard actually requires.<sup>35</sup> At the other end of the spectrum are courts that insist that the ordinary pleading standard continues to be a liberal one focused on notice,<sup>36</sup> with some courts even going so far as to apply the repudiated "no set of facts" test to scrutinize the sufficiency of claims.<sup>37</sup> On the issue of whether specific facts are needed in the pleadings after *Twombly*, the lower federal courts have also expressed divergent views.<sup>38</sup>

33. See, e.g., *Commercial Money Ctr., Inc. v. Ill. Union Ins. Co.*, 508 F.3d 327, 337 n.4 (6th Cir. 2007) ("We have noted some uncertainty concerning the scope of *Bell Atlantic Corp. v. Twombly* . . .").

34. *Phillips v. County of Allegheny*, 515 F.3d 224, 230 (3d Cir. 2008).

35. See, e.g., *Mountain Area Realty, Inc. v. Wintergreen Partners, Inc.*, No. 3:07cv00016, 2007 WL 4561293, at \*2 (W.D. Va. Dec. 21, 2007) ("[I]n the antitrust context there is a heightened standard of pleading as elucidated by the Supreme Court in *Bell Atlantic Corporation v. Twombly* . . .").

36. See, e.g., *Tamayo v. Blagojevich*, 526 F.3d 1074, 1083 (7th Cir. 2008) (stating that *Twombly* "did not . . . supplant the basic notice-pleading standard"); *Filipek v. Krass*, 576 F. Supp. 2d 918, 922 (N.D. Ill. 2008) (referring to the *Twombly* plausibility approach as a "liberal notice-pleading standard"); *Mull v. Abbott Labs.*, 563 F. Supp. 2d 925, 930 (N.D. Ill. 2008) ("[T]he Court did not adopt a fact-pleading standard to supplant the notice-pleading standard that has long applied in federal court.").

37. See, e.g., *Goltens N.Y. Corp. v. Goltens*, No. 07 CV 9711 (GBD), 2008 U.S. Dist. LEXIS 56280, at \*6-7 (S.D.N.Y. July 23, 2008) ("Dismissal is improper unless it appears beyond doubt, even when the complaint is liberally construed, that the plaintiff can prove no set of facts which would entitle him to relief.") (internal quotation marks omitted); *DeVile v. Reg'l Transit Auth.*, No. 07-1345, 2008 WL 200020, at \*3 (E.D. La. Jan. 22, 2008) ("Dismissal of a complaint pursuant to Fed.R.Civ.P. 12(b)(6) is proper only if the pleadings on their face reveal beyond a doubt that the plaintiff can prove no set of facts that would entitle him to relief . . .").

38. Compare *Baisden v. I'm Ready Prods., Inc.*, No. H-08-0451, 2008 WL 2118170, at \*2 (S.D. Tex. May 16, 2008) ("To avoid dismissal pleadings must contain specific, well-pleaded facts, not mere conclusory allegations." (citing *Guidry v. Bank of LaPlace*, 954 F.2d 278, 281 (5th Cir. 1992))), with *id.* at \*6 ("Rule 8(a) does not require pleading specific facts in support of each element of a plaintiff's prima facie case . . ." (quoting *Lovick v. Ritemoney Ltd.*, 378 F.3d 433, 438 (5th Cir. 2004))). One court tried to reconcile the simultaneous need for sufficient facts with the notion



There are also courts in the middle, whose opinions reveal a tension between the tendency to affirm the continuation of notice pleading and the sense that the Supreme Court has revised that standard or even supplanted it with a new, more stringent one. For example, in *Challenger Powerboats, Inc. v. Evans*<sup>39</sup> the court referred to “the *new* standard of review delineated by the United States Supreme Court in *Bell Atlantic Corp. v. Twombly*,”<sup>40</sup> but in the next breath wrote that “[t]he simplified notice pleading standard under [Rule] 8(a) requires only a statement that gives the defendant fair notice of what the plaintiff’s claim is and the grounds upon which it rests.”<sup>41</sup> This tension also plays itself out in the effort of courts to require factual specifics while simultaneously reciting the official line that specifics are not required; thus, as one court remarked, “Missing, however, is any specific allegation that defendants’ representatives actually met to fix prices. . . . This is not to say that to survive a motion to dismiss, plaintiffs must plead specific back-room meetings between specific actors at which specific decisions were made.”<sup>42</sup>

In addition to confusion over whether fact pleading has replaced a true notice-pleading regime, there is some evidence that *Twombly* has weakened the requirement that courts assume the truth of a claimant’s factual assertions.<sup>43</sup> A long-standing component of pleading jurisprudence under the Federal Rules has been that a court is obligated to assume the truth of all of the factual allegations in the complaint and to construe such allegations in a

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that detailed facts are not required thusly: “While the factual allegations need not be pleaded in great detail, they must be sufficiently precise to raise a right to relief above the speculative level.” *Effkay Enters. v. J.H. Cleaners, Inc.*, No. 07-cv-02521-LTB, 2008 WL 2357698, at \*2 (D. Colo. June 5, 2008).

39. No. 4:07CV85 TIA, 2007 WL 2885346 (E.D. Mo. Sept. 27, 2007).

40. *Id.* at \*2 (emphasis added); see also *Bonanno v. Quizno’s Franchise Co.*, No. 06-cv-02358-WYD-KLM, 2008 WL 638367, at \*2 (D. Colo. Mar. 5, 2008) (“[T]he Supreme Court . . . has prescribed a new inquiry for us to use in reviewing a dismissal: whether the complaint contains ‘enough facts to state a claim to relief that is plausible on its face.’” (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007))).

41. *Challenger Powerboats*, 2007 WL 2885346, at \*3 (internal quotation marks omitted); see also *Gregory v. Dillard’s, Inc.*, 494 F.3d 694, 710 (8th Cir. 2007) (referring post-*Twombly* to “the simplified notice pleading standard”), *vacated and reh’g en banc granted*, 2007 U.S. App. LEXIS 30549 (8th Cir. Sept. 20, 2007).

42. *In re Graphics Processing Units Antitrust Litig.*, 527 F. Supp. 2d 1011, 1023–24 (N.D. Cal. 2007); see also *Gregory*, 494 F.3d at 710 (stating that “[g]reat precision is not required of the pleadings” but upholding a complaint as sufficient because “[t]he complaint states how, when, and where [the plaintiffs] were discriminated against”); *Lady Deborah’s, Inc. v. VT Griffin Servs., Inc.*, No. CV207-079, 2007 WL 4468672, at \*7 (S.D. Ga. Oct. 26, 2007) (“Conclusory allegations that defendant violated the antitrust laws and plaintiff was injured thereby will not survive a motion to dismiss if not supported by facts constituting a legitimate claim for relief. . . . However, the alleged facts need not be spelled out with exactitude, nor must recovery appear imminent.” (quoting *Quality Foods de Centro Am., S.A. v. Latin Am. Agribusiness Dev. Corp.*, 711 F.2d 989, 995 (11th Cir. 1983))).

43. At least one court has suggested that *Twombly* did away with the assumption-of-truth rule altogether. See *United States ex rel. Phillips v. Front Range Home Improvements, Ltd.*, No. 06-cv-00927-WYD-MJW, 2008 WL 1818003, at \*2 (D. Colo. Apr. 21, 2008) (“In ruling on a Motion to Dismiss pursuant to 12(b)(6), the standard *used to be* that the court ‘must accept all the well-pleaded allegations of the complaint as true and construe them in the light most favorable to the plaintiff.’” (emphasis added) (citation omitted)).

light favorable to the plaintiff.<sup>44</sup> The *Twombly* Court itself repeated this rule, writing that courts must assume that “all the allegations in the complaint are true (even if doubtful in fact).”<sup>45</sup> And, to be sure, most courts have continued to state the assumption-of-truth rule.<sup>46</sup> However, the *Twombly* Court’s statements regarding plausibility have given some courts a basis for applying more skepticism to factual allegations than the assumption-of-truth principle would seem to allow. For example, in *DavCo Acquisition Holding, Inc. v. Wendy’s International*<sup>47</sup> the plaintiff made clear factual assertions, namely, that: (1) Coca-Cola paid Wendy’s \$42 million plus a portion of the proceeds of syrup sales to Wendy’s; (2) Coca-Cola inflated the price of its syrup sold to Wendy’s franchisees to cover the cost of these contributions; and (3) the price inflation was done pursuant to an agreement between Coca-Cola and Wendy’s with the idea that Coca-Cola would kick back to Wendy’s excess profits on the sale of its syrup to franchisees.<sup>48</sup> The judge rejected the plaintiff’s allegation of a price-fixing conspiracy and kickback scheme as too speculative, concluding that there were no facts offered to back up that assertion.<sup>49</sup> The assumption-of-truth rule would seem to require that the above-mentioned allegations be accepted as true, in which case an unlawful conspiracy would be properly described. That this and other courts<sup>50</sup> have understood *Twombly* as permitting healthier doses of fact skepticism notwithstanding the assumption-of-truth principle is only confirmation that *Twombly*’s ultimate message regarding pleading standards is unclear.<sup>51</sup>

### B. A Lack of Precision

Pleading doctrine after *Twombly* also suffers from a lack of precision. To be fair, the core standard articulated in Rule 8 is itself imprecise to a certain

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44. See, e.g., *Fernandez v. Chertoff*, 471 F.3d 45, 59 (2d Cir. 2006) (“[T]his Court must, on this Rule 12(b)(6) motion to dismiss, assume the truth of all well-pleaded factual allegations and draw all reasonable inferences in favor of [the plaintiff] . . .”).

45. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

46. See, e.g., *Am. Int’l Specialty Lines Ins. Co. v. United States*, No. 05-1020 C, 2008 WL 1990859, at \*12 (Fed. Cl. Jan. 31, 2008) (“In ruling on a motion to dismiss, the court assumes that the allegations in the complaint are true and construes those allegations in plaintiff’s favor.”).

47. No. 2:07-cv-1064, 2008 WL 755283, at \*1 (S.D. Ohio Mar. 19, 2008).

48. *Id.* at \*8–9.

49. *Id.* at \*10.

50. For example, in *Snead v. Unknown Number of U.S. Bureau of Prisons Officers*, No. 2:08-cv-123 (S.D. Ind. June 20, 2008), the court, on a motion to dismiss, recharacterized the inmate-plaintiff’s allegation that he “tossed bread back on the counter” and was then beaten by the inmate food service worker as “Snead proceeded to throw the wet bread at Boyd [the inmate food service worker],” thus provoking the beating that Snead subsequently received. This is a clear violation of the assumption-of-truth principle that likely fed into the court’s ultimate conclusion that there was an “absence of a plausible basis for recovery under the Eighth Amendment.” *Id.* at \*2.

51. The message from the Court in its follow up to *Twombly*, *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009), may suggest fact skepticism even more strongly given the *Iqbal* majority’s determination that the plaintiff’s allegations of top-level involvement in shaping the discriminatory policy of which he was complaining was “not entitled to the assumption of truth.” *Id.* at 1940.

extent; there is no objective understanding of what makes a statement “short” or “plain” and what one must do to show entitlement to relief is hardly self-evident. Even *Conley*’s explanation that the complaint must only “give the defendant fair notice of what the . . . claim is and the grounds upon which it rests”<sup>52</sup> leaves us wondering when “fair notice” is achieved. However, what gave pleading doctrine some precision before *Twombly* was the other famous remark from *Conley*: “[A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.”<sup>53</sup> Broad and permissive as that now-repudiated standard may have been, whether a complaint satisfied that test—at least as a theoretical matter—was less subject to debate.<sup>54</sup>

The doctrine as modified by *Twombly* is much less precise. This defect arises from the *Twombly* Court’s repeated use of subjective concepts as the building blocks of its iteration of the doctrine. Specifically, the Court variously articulates the appropriate standard by offering the following guidance:

[A] plaintiff’s obligation to provide the “grounds” of his “entitle[ment] to relief” requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.<sup>55</sup>

Factual allegations must be enough to raise a right to relief above the speculative level on the assumption that all the allegations in the complaint are true (even if doubtful in fact).<sup>56</sup>

[W]e hold that stating [a Sherman Act Section 1] claim requires a complaint with enough factual matter (taken as true) to suggest that an agreement was made. Asking for plausible grounds to infer an agreement does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement.<sup>57</sup>

The need at the pleading stage for allegations plausibly suggesting (not merely consistent with) agreement reflects the threshold requirement of Rule 8(a)(2) that the “plain statement” possess enough heft to “sho[w] that the pleader is entitled to relief.”<sup>58</sup>

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52. 355 U.S. 41, 47 (1957).

53. *Id.* at 45–46.

54. That said, it is certainly true that this standard in its pure form was departed from prior to *Twombly* with great frequency, either through the imposition of heightened pleading, or through application of the court-created rule that the pleading of legal conclusions was insufficient. Heightened pleading standards and the rule against pleading legal conclusions both lack the precision of the “no set of facts” standard.

55. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

56. *Id.* (citation omitted).

57. *Id.* at 556.

58. *Id.* at 557.

Concepts such as “more than labels and conclusions,” “above the speculative level,” “plausible grounds to infer,” “enough factual matter to suggest,” “reasonable expectation,” and “enough heft” are instructive in that they tell litigants that more than a possibility but less than a probability must be shown. Beyond that, however, there is uncertainty regarding precisely what level of factual detail will make a statement of a claim plausible and nonspeculative. Indeed, courts may disagree regarding the plausibility of a claim unless that term is given more objective definition. Absent further specification, then, the *Twombly* pleading standard requiring plausibility might be too subjective to yield predictable and consistent results across cases. Developing a theory that describes the essence of what the *Twombly* Court was getting at would thus lend much-needed precision to the doctrine.

### C. Approaching the Theory

The lack of clarity and precision described above is problematic because claimants will be uncertain about what they must plead, defendants will be emboldened to challenge the sufficiency of claims, and courts may apply inconsistent standards that lead to divergent results in similar cases. What is needed, then, is a deconstruction of pleading doctrine post-*Twombly*, one that goes beyond court rhetoric and seeks to get at the heart of what the doctrine truly requires in the ordinary case.<sup>59</sup>

Our journey to deconstruct pleading doctrine must begin with a brief review of what the two most important sources of pleading law—Federal Rule 8(a) and the *Twombly* decision—say about the requisites of properly stating a claim. Rule 8(a) offers us this familiar admonition: “A pleading that states a claim for relief must contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief.”<sup>60</sup> Although our attention previously might have been on the need for the statement to be “short and plain” and the Court’s earlier indication that notice of the grounds for relief—not factual detail—were the heart of this standard,<sup>61</sup> *Twombly* has turned our gaze toward the obligation under the rule to make a “showing” that the pleader *is* (if the allegations are true) entitled to relief. Several statements from *Twombly* indicate this shift. First, the Court emphasized that “Rule 8(a)(2) still requires a ‘showing,’ rather than a blanket assertion, of entitlement to relief.”<sup>62</sup> Mere legal “labels and conclusions” that simply recite the elements of a cause of action cannot make such a showing.<sup>63</sup> Rather, it takes

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59. We are concerned here only with doctrine covering pleading under Rule 8(a)(2), which covers ordinary claims, rather than the doctrine governing claims for which heightened pleading is prescribed, such as claims of fraud.

60. FED. R. CIV. P. 8(a)(2).

61. *Conley v. Gibson*, 355 U.S. 41, 45–46 (1957).

62. *Twombly*, 550 U.S. at 555 n.3.

63. *Id.* at 555 (“[A] plaintiff’s obligation to provide the ‘grounds’ of his ‘entitle[ment] to relief’ requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.”).

factual allegations to do the job.<sup>64</sup> Second, the Court indicated that the Rule 8(a) "showing" is one that must plausibly demonstrate entitlement to relief, not simply render entitlement a possibility.<sup>65</sup> Such a demonstration is made only if the facts presented move from being speculative,<sup>66</sup> toward—aided by the assumption of truth<sup>67</sup>—being suggestive of liability.<sup>68</sup>

Although we know, then, that Rule 8 under *Twombly* requires the allegation of facts that plausibly suggest entitlement to relief, we still lack a concrete understanding of what that means in practical terms. That is, if it is simultaneously true that "a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations,"<sup>69</sup> but that "[f]actual allegations must be enough to raise a right to relief above the speculative level,"<sup>70</sup> how are courts and litigants to figure out when sufficient facts have been alleged? The Federal Rules do give some additional guidance by referring us to the Appendix of Forms.<sup>71</sup> For example, Form 11 reads, "On *date*, at *place*, the defendant negligently drove a motor vehicle against the plaintiff."<sup>72</sup> Form 12 reads, "On *date*, at *place*, defendant *name* or defendant *name* or both of them willfully or recklessly or negligently drove, or caused to be driven, a motor vehicle against the plaintiff."<sup>73</sup>

Do these forms really comply with the *Twombly* standard? They do include factual allegations regarding the time and location of the accident and the fact that the defendant drove a motor vehicle into the plaintiff. But what of the conclusory terms "negligently," "willfully," and "recklessly"? *Twombly* suggested that conclusory terms could not be made to do the work of actual fact allegations.<sup>74</sup> Use of "negligently" in Form 11 is shorthand for alleging that the defendant breached some applicable duty of care in causing this accident. However, the facts supporting the plaintiff's notion that there

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64. *Id.* at 555 n.3 ("Without some factual allegation in the complaint, it is hard to see how a claimant could satisfy the requirement of providing not only 'fair notice' of the nature of the claim, but also 'grounds' on which the claim rests.").

65. *Id.* at 557 (speaking of the need to traverse "the line between possibility and plausibility of 'entitle[ment] to relief'").

66. *Id.* at 555 ("Factual allegations must be enough to raise a right to relief above the speculative level . . .").

67. *Id.* (restating "the assumption that all the allegations in the complaint are true (even if doubtful in fact)").

68. *Id.* at 557 ("The need at the pleading stage for allegations plausibly suggesting (not merely consistent with) agreement reflects the threshold requirement of Rule 8(a)(2) that the 'plain statement' possess enough heft to 'sho[w] that the pleader is entitled to relief.'"); *id.* at 557 n.5 ("The border . . . between the factually neutral and the factually suggestive. . . must be crossed to enter the realm of plausible liability.").

69. *Id.* at 555.

70. *Id.*

71. FED. R. CIV. P. 84 ("The forms in the Appendix suffice under these rules and illustrate the simplicity and brevity that these rules contemplate.").

72. FED. R. CIV. P. form 11.

73. FED. R. CIV. P. form 12.

74. *Twombly*, 550 U.S. at 555 ("[A] plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions . . .").

was such a breach are not offered; the same can be said of Form 12's use of "willfully" and "recklessly."<sup>75</sup> How then are these model statements suggestive of an entitlement to relief if liability is premised on undisclosed facts about the defendant's conduct? A better question still: how can the deemed sufficiency of these and other official forms be reconciled with *Twombly*'s admonition that suggestive facts rather than legal conclusions be pleaded? Finally, if it is acceptable to use "recklessly" to turn a description of facts into a sufficient statement of a legal claim, why can the terms "discriminatorily" or "conspired" not be used to the same effect, as in "On *date*, at *place*, the defendant discriminatorily fired me from my job based on gender"?<sup>76</sup>

Professor Ides defends the sufficiency of Form 11 by arguing that "from the facts alleged, including the 'conclusory' allegation of negligence, one can infer the types of facts the plaintiff will rely on to establish the asserted claim, albeit not the precise facts . . . ."<sup>77</sup> This argument is ultimately incomplete, however, because it does not reveal what about the form's statement is suggestive of a breach of duty nor does it give us a principle that will tell us why the same approach will not work for a discrimination claim. If a complaint used the term "discriminatorily" as in the example at the end of the previous paragraph, one could still "infer the types of facts the plaintiff will rely on to establish the asserted claim" as Professor Ides said was the case for the negligence claim.<sup>78</sup> This characteristic thus fails to get at the heart of what distinguishes a sufficient claim from an insufficient one under current pleading doctrine. A theory, then, is needed both to concretize *Twombly*'s expectations for pleadings and also to explain how the use of conclusory legal terms in connection with other facts works in some contexts (such as the negligence and recklessness claims of Forms 11 and 12) but not in others such as discrimination or antitrust conspiracy claims. It is to the development of such a theory that we will now turn.

## II. A PRESUMPTION-BASED THEORY OF PLEADING

*Twombly* and *Iqbal* leave no doubt that to state a claim sufficiently, a plaintiff must allege at least some facts. But what level of factual specificity is required under Rule 8? *Twombly*'s answer is that enough facts must be

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75. See Spencer, *supra* note 22, at 472 ("[W]hat makes the defendant's driving reckless in Form 12? Excessive speed? Driving on the wrong side of the road? Driving at night without headlights illuminated?").

76. There is extensive case law revealing the insufficiency of such a statement of an unlawful-discrimination claim. For my review of this body of precedent, both pre- and post-*Twombly*, see Spencer, *Pleading Civil Rights Claims*, *supra* note 24.

77. Allan Ides, *Bell Atlantic and the Principle of Substantive Sufficiency Under Federal Rule of Civil Procedure 8(a)(2): Toward a Structured Approach to Federal Pleading Practice*, 243 F.R.D. 604, 612–13 (2007).

78. For example, one might infer in such a case that the plaintiff will elicit documents, communications, or statements from witnesses that indicate gender was the motivating factor behind the dismissal.

offered to render the claim plausible and not speculative.<sup>79</sup> What does this mean in practice? As it turns out, the type of factual detail needed to achieve this goal varies depending on the legal and factual context in which a claim is situated.<sup>80</sup> More specifically, it appears that legal claims that apply liability to factual scenarios that otherwise do not bespeak wrongdoing will be those that tend to require greater factual substantiation to traverse the plausibility threshold. Let me explain.

Any given factual scenario<sup>81</sup> will either convey some sense of specific wrongdoing in the eyes of the law, will be neutral in that respect, or will affirmatively indicate the absence of wrongdoing.<sup>82</sup> It is the line between the first two circumstances that is our concern.<sup>83</sup> An example of a factual scenario that conveys a sense of wrongdoing might be the following: “A and B entered into a contract that obligated B to do X; B failed to do X and thus failed to perform her duty under the contract; A was harmed by B’s failure to perform in the amount of Y dollars.” This statement suggests wrongdoing on the part of B because if it is true, B is liable for breach of contract. In other words, the hypothetical scenario presents circumstances that possess what I will refer to as a *presumption of impropriety*. Notice that this presumption arises solely as a result of the allegation of observed or experienced *objective facts* about what transpired—the existence of a contract<sup>84</sup> specifying the

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79. *Twombly*, 550 U.S. at 555–56.

80. This is a notion picked up on by Chief Justice Roberts, as reflected in his comments during the oral argument for *Ashcroft v. Iqbal*: “I thought in Bell Atlantic what we said is that there’s a standard but it’s [] affected by the context in which the allegations are made. That was a context of a particular type of antitrust violation and that affected how we would look at the complaint.” Transcript of Oral Argument at \*37, *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009) (No. 07-1015).

81. Here I am not speaking of factless scenarios such as “The defendant had a duty of care that it breached against the plaintiff” or “The defendant’s product was unreasonably dangerous and therefore defective.” Such allegations, which simply convert the elements of a legal claim into affirmative, factless assertions, are conclusory and completely fail to show entitlement to relief. See *Twombly*, 550 U.S. at 555 (“[A] plaintiff’s obligation to provide the ‘grounds’ of his ‘entitle[ment] to relief’ requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.”).

82. An example of this latter circumstance is found in *Saunders v. Farmers Insurance Exchange*, 537 F.3d 961 (8th Cir. 2008), where the complaint alleged intentional discrimination but alleged facts indicating defendant’s use of neutral criteria, something that would support a disparate-impact case. *Id.* at 964 (“[P]laintiffs provide no factual basis for their conclusory allegations that the Insurers intentionally charged rates based on a homeowner’s race. Their factually explicit allegations are that the Insurers used rating zones based on facially neutral risk factors that have a disparate racial impact.”).

83. See *Twombly*, 550 U.S. at 557 (speaking of “the line between possibility and plausibility of entitlement to relief”) (internal quotation marks omitted).

84. Although the term “contract” is itself a legal term of art, its use here by the plaintiff makes a factual statement about the creation of a binding agreement between the plaintiff himself and the defendant. The obligation to accept the truth of plaintiff’s factual assertions obviates the need for treating the allegation of a “contract” as a legal rather than factual allegation because the plaintiff may simply append the contract to the complaint, if written, or simply attest to the terms of the agreement, if oral or written, to support the assertion. Any effort to challenge the veracity of the plaintiff’s representations about the matter would be inappropriate at the pleading stage. Contrast this with the allegation of a “conspiracy” or an “agreement” in the antitrust context. Because the plaintiff is making a claim about what transpired between the defendants or between the defendants

duty of *X*, *B*'s nonperformance, and harm to *A*—rather than a supposition about *B*'s state of mind or subjective motivations. Form 11 suggests another example of a statement possessing a presumption of impropriety: “On [date] at [place] *B* struck *A* with his motor vehicle and *A* suffered personal injuries as a result.”<sup>85</sup> Because one does not ordinarily hit a person with a motor vehicle, the facts described suggest wrongdoing and thus enjoy the presumption of impropriety.<sup>86</sup> These observations lead to an initial proposition in the theory of pleading we are presently developing:

*Proposition 1:* If allegations of objective facts present a scenario that, if true, suggests wrongdoing on the part of the defendant, that scenario possesses a presumption of impropriety and thus sufficiently states a claim.

Conversely, however, when a factual scenario is neutral respecting wrongdoing, the presumption of impropriety will not apply. An example of such a scenario would be a statement to the following effect: “*B* fired *A* from her job and *A* was damaged as a result.” The objective facts offered do not suggest wrongdoing because *B* could have had legitimate reasons for firing *A*; firings in our society are not ordinarily or presumptively for inappropriate reasons. Because, as the Supreme Court has now reminded us, Rule 8 requires that a statement of a claim must make a “showing” that the pleader is “entitled” to relief,<sup>87</sup> if lawful reasons could explain factual occurrences reported in a complaint just as well as unlawful ones might, no such showing of entitlement has been made. Rather, there may simply be a possibility of liability, but not one about which there can be any confidence absent additional information. Under such circumstances, then, we would be able to say that the scenario enjoys a *presumption of propriety*. Another example would be “ABC, Inc. manufactured product *X*; product *X* failed to perform properly; Plaintiff was injured and suffered damages as a result.” Although something is amiss when a product fails to perform properly, the presumption is not that the failure is attributable to the manufacturer; the manufacturer’s fault may be an explanation, but other explanations such as

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and third parties rather than between the attesting plaintiff and others, the assertion ceases to be an objective fact that the plaintiff can report simply by invocation of the previously quoted terms.

85. See FED. R. CIV. P. form 11 (providing acceptable language for alleging negligence in the context of a motor-vehicle collision).

86. In other words, hitting a person with a motor vehicle deviates sufficiently from ordinary behavior that we incline toward the conclusion that something is awry, namely, that the operator of the vehicle did something wrong. Several commentators have attempted to get at this concept of a set of facts that deviate from the ordinary in a way that suggests wrongdoing. Professor Robert G. Bone, building on the analysis offered in this Article, refers to “a baseline of normality” as the standard against which such deviations should be judged. Robert G. Bone, Twombly, *Pleading Rules, and the Regulation of Court Access*, 94 IOWA L. REV. 873, 888–89 (2009) (“What Twombly requires are allegations describing a state of affairs that differs from a baseline of normality, and in a way that supports a stronger correlation to wrongdoing than for baseline conduct.”). Professor Geoffrey Miller refers to the notion of our “ordinary assumptions about the world” and “background assumption[s]” about individual or corporate behavior as the measuring rod for sensing wrongdoing when a reading of a set of facts. Geoffrey P. Miller, *Pleading after Tellabs* 4, 9 (NYU Law & Econ. Research Paper Series, Working Paper No. 08-16, 2008), available at <http://ssrn.com/abstract=1121396>.

87. FED. R. CIV. P. 8(a)(2); see also Twombly, 550 U.S. at 555 n.3 (“Rule 8(a)(2) still requires a ‘showing,’ rather than a blanket assertion, of entitlement to relief.”).



damage by the seller or misuse by the consumer are equally possible alternate explanations. More factual information is needed to overcome the presumption of propriety to suggest liability on the part of the manufacturer. Thus we arrive at the second proposition of the theory:

*Proposition 2:* If allegations of objective facts present a scenario that, if true, is neutral with respect to wrongdoing by the defendant, that scenario enjoys a presumption of propriety and thus fails to state a claim.

These were the conditions that obtained in *Twombly*. As the Court wrote there, "The inadequacy of showing parallel conduct or interdependence, without more, mirrors the ambiguity of the behavior: consistent with conspiracy, but just as much in line with a wide swath of rational and competitive business strategy unilaterally prompted by common perceptions of the market."<sup>88</sup> The facts presented were equivocal and thus the presumption of propriety was not overcome.

What additional information would help either of the preceding hypothetical examples overcome the presumption of propriety? In our first example, adding "because of my race" to the assertion that "*B* fired *A* from her job" would be a step in the right direction, for it would indicate that the reasons for the termination were indeed illegitimate. However, we now confront a new problem. The scenario as initially stated consisted exclusively of objective facts that failed to tilt either toward a legitimate or illegitimate explanation. The proffered amendment attributing the firing to the race of the employee does not offer an additional objective fact but rather a *supposition*. That is, without more information, the allegation that race was the motive in the dismissal is not a fact that any disinterested party could have observed, but is rather a belief that the claimant has about what the defendant's motives were. Suppositions that are unsupported by additional objective facts are simply *speculative suppositions*. Here, then, we reach our third proposition of the theory:

*Proposition 3:* If the objective facts alleged present a scenario that enjoys a presumption of propriety, the addition of speculative suppositions to suggest wrongdoing will not overcome that presumption and the pleading will fail to state a claim.

Thus, in our second example, adding "because of a manufacturing defect" to the allegation that "product *X* failed to perform properly" will not overcome the presumption of propriety because the plaintiff—in the absence of any additional information—is merely supposing or speculating that a manufacturing defect is to blame.

We ask again, then, what further allegations would cause these two scenarios to escape the presumption of propriety. In short, the infusion of additional objective facts suggestive of impropriety on the part of the defendant should do the trick. Thus, the wrongful-termination allegations become sufficient when modified as follows: "*B* fired *A* from her job because of sex

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88. *Twombly*, 550 U.S. at 554.

and race; *B* fired *A* by telling her, ‘You are too black for this job, and it is not a job a woman should be doing anyway’; *A* was damaged as a result.” Now the plaintiff has supplied an objective fact that suggests a wrongful rather than a permissible termination, thus overcoming the presumption of propriety. Other additional objective facts, such as the fact that the employer failed to terminate less qualified non-African American employees, would also be suggestive of wrongdoing.<sup>89</sup> Although the ultimate allegation that the termination was based on sex and race itself is not an objective fact, the assertion is no longer a speculative supposition because there is an objective fact that supports it. Thus, the allegation is now a *supported implication*.<sup>90</sup> Our fourth proposition, then, is as follows:

*Proposition 4:* If the objective facts alleged present a scenario that enjoys a presumption of propriety, the addition of supported implications that suggest wrongdoing will overcome that presumption and thus the pleading will properly state a claim.

This proposition explains what the *Twombly* Court was looking for when it wrote, “[W]hen allegations of parallel conduct are set out in order to make a § 1 claim, they must be placed in a context that raises a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent action.”<sup>91</sup>

How would our second hypothetical claim of a manufacturing defect become a supported implication rather than a speculative supposition? Consider a complaint that alleged the following:

ABC, Inc. manufactured Brand X windshields; ABC made its windshields by gluing two pieces of glass together at the center of the windshield, a process that makes the windshield highly susceptible to shattering in high winds or when hit with water; the plaintiff’s Brand X windshield failed to perform properly by shattering in the rain because of this manufacturing defect; Plaintiff was injured and suffered damages as a result.

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89. The pleadings in *Mull v. Abbott Laboratories*, 563 F. Supp. 2d 925, (N.D. Ill. 2008), provide an example:

Here, Plaintiff alleges that she is African-American; that she worked for Defendant for nearly six years and performed her job satisfactorily; and that Defendant took various adverse actions against her based on her race, including terminating her. She further alleges that less qualified non-African-American employees, including one whom Plaintiff trained, were not terminated. Plaintiff has pled enough to state a plausible claim for discriminatory discharge.

*Id.* at 930–31; see also *Tamayo v. Blagojevich*, 526 F.3d 1074, 1085 (7th Cir. 2008) (holding that the plaintiff adequately stated sex-discrimination claim where she alleged that she is female; she suffered adverse employment action; defendant discriminated against her based on her sex; and similarly situated male employees were treated more favorably).

90. The concept of a supported implication is the “reasonable inference” to which courts refer when they recite their obligation to “accept well-pled factual allegations in the complaint as true and make all reasonable inferences in plaintiff’s favor.” *Miss. Pub. Employees’ Ret. Sys. v. Boston Scientific Corp.*, 523 F.3d 75, 85 (1st Cir. 2008).

91. *Twombly*, 550 U.S. at 557; see also *id.* (“A statement of parallel conduct, even conduct consciously undertaken, needs some setting suggesting the agreement necessary to make out a § 1 claim; without that further circumstance pointing toward a meeting of the minds, an account of a defendant’s commercial efforts stays in neutral territory.”).

The new information regarding the manufacturing process and the dangerousness of using that process can be characterized as objective facts in that they are facts that disinterested third parties could either observe or verify through testing. In this context, the claim that the failure of the windshield is attributable to a manufacturing defect is a supported implication, because the objective facts alleged indicate the presence of a problem that would cause the incident that the plaintiff describes.

To summarize, successfully stating a claim requires the presentation of a factual scenario that possesses a presumption of impropriety based on objective facts and supported implications. To use the *Twombly* Court's terms, a scenario possessing a presumption of impropriety based on objective facts and supported implications states a plausible claim, while neutral facts relying on speculative suppositions to show liability will merely state possible,<sup>92</sup> conceivable,<sup>93</sup> or speculative<sup>94</sup> claims.

### III. THE VALUES OF PLEADING

Thus far we have established that contemporary pleading doctrine requires the allegation of objective facts coupled with supported implications before a claim may proceed and that those legal claims that tend to rely on suppositions about motivation or concealed activities will require more factual detail. Now we turn to a consideration of what values underlie the doctrine to arrive at some additional principles that might inform our understanding of how pleadings are to be scrutinized under *Twombly*. Historically, there have been three—sometimes competing—values offered to explain why pleading doctrine is the way that it is. An enduring value is *notice*, the idea that the information required under pleading doctrine is necessary to afford notice to one's adversaries of the charges against them, without which they might not be prepared to mount a defense.<sup>95</sup> A second value is *efficiency*, the idea that current pleading standards are meant to ensure that the expense to defendants and to the courts of permitting a claim to proceed is justified by some showing of a likelihood of merit. This value acknowledges that litigating meritless claims beyond the pleading stage wastes valuable time and money and thus it is important to screen out such claims at the earliest possible stage of the litigation.<sup>96</sup> A final value, *justice*, represents—in

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92. See *id.* (speaking of “the line between possibility and plausibility of ‘entitle[ment] to relief’”).

93. See *id.* at 570 (“Because the plaintiffs here have not nudged their claims across the line from conceivable to plausible, their complaint must be dismissed.”).

94. See *id.* at 555 (“Factual allegations must be enough to raise a right to relief above the speculative level . . .”).

95. This was the rationale given by the Court in *Conley v. Gibson*, 355 U.S. 41, 47 (1957). *Id.* (“[A]ll the Rules require is ‘a short and plain statement of the claim’ that will give the defendant fair notice of what the plaintiff’s claim is and the grounds upon which it rests.”).

96. This rationale featured prominently in *Twombly*. *E.g.*, 550 U.S. at 558 (“[W]hen the allegations in a complaint, however true, could not raise a claim of entitlement to relief, ‘this basic deficiency should . . . be exposed at the point of minimum expenditure of time and money by the

part—the idea that disputes should be resolved on the merits;<sup>97</sup> meritorious claims might be screened out if overly stringent pleading standards are applied before the opportunity for discovery has been given.<sup>98</sup> Each of these values and the extent to which they factor into giving shape to contemporary pleading doctrine will be discussed below.

### A. Notice

Notwithstanding decades of rhetoric in favor of notice as a rationale for pleading standards and the still-used label of “notice pleading” to describe our system,<sup>99</sup> the value of notice is largely irrelevant to understanding contemporary standards of substantive sufficiency in pleading.<sup>100</sup> Certainly one of the important functions of a complaint is to give the defendant notice of the claim. Also, it is true that a complaint can be so vague that it fails to provide proper notice and thus can be deemed insufficient on those grounds. However, a complaint that adequately provides notice is not necessarily sufficient to state a claim. A claim that asserts, “My employer, the defendant, fired me because of my gender” notifies the defendant of the nature and basis of the claim such that the defendant can respond with an admission and denial and move on to discovery. Further, if any additional information is needed, it may be obtained, in advance of a responsive pleading, via a motion for a more definite statement.<sup>101</sup> Thus, the statement is insufficient under *Twombly* not because of anything to do with notice but because it fails to suggest liability with anything beyond an unsupported speculation. The value of notice, then, does not help us figure out what level of factual detail is needed to show plausible entitlement to relief. Neither does it tell us why

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parties and the court.’”) (citation omitted); *id.* (“[P]roceeding to antitrust discovery can be expensive. . . . ‘[A] district court must retain the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed.’” (quoting *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 528 n.17 (1983))).

97. See, e.g., Laurence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181, 184–85 (2004) (“If we take the rules of substantive law (torts, contracts, property, and so forth) as applied to the facts (the state of the world) as the criteria for just outcomes, then the ideal procedure would discern the truth about the facts and apply the law to those facts with 100% accuracy.”).

98. Conversely, meritless claims may impose undue burdens and expense on defendants if pleading standards are too lax, which would represent a sort of injustice to defendants.

99. See, e.g., *Deschamps v. District of Columbia*, 582 F. Supp. 2d 14, 16 (D.D.C. 2008) (“The Rule 8 standard ensures that defendants receive fair notice of the claim so that they can prepare a responsive answer and an adequate defense.” (citing *Twombly*, 550 U.S. at 555)).

100. Professor Ides makes the same point when he writes, “[T]he question of the substantive adequacy of the claim asserted has nothing to do with fair notice.” Ides, *supra* note 77, at 610; see also Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433, 451 (1986) (“[N]otice pleading is a chimera.”).

101. FED. R. CIV. P. 12(e) (“A party may move for a more definite statement of a pleading to which a responsive pleading is allowed but which is so vague or ambiguous that the party cannot reasonably prepare a response.”). The Supreme Court emphasized this point in *Swierkiewicz v. So-remex N.A.*, 534 U.S. 506 (2002), when it wrote, “If a pleading fails to specify the allegations in a manner that provides sufficient notice, a defendant can move for a more definite statement under Rule 12(e) before responding.” *Id.* at 514.

such a showing is necessary; notice can be achieved without it so some other value must explain the requirement.

Why, then, all the talk of notice in the pleadings cases throughout the years? Such talk is likely an enduring remnant of the original motivation of the drafters of Rule 8; Charles Clark, the reporter to the initial rules-drafting committee, wrote extensively of the idea that notice to the defendant was the primary goal of pleadings.<sup>102</sup> The Supreme Court in *Conley v. Gibson* sealed the deal when it made the famous pronouncement that the Rules require only a statement “that will give the defendant fair notice of what the plaintiff’s claim is and the grounds upon which it rests.”<sup>103</sup> Courts echoed that view over the next fifty years<sup>104</sup> and continue to do so to this day, prodded on in this regard by the Supreme Court itself.<sup>105</sup> So there is a fair amount of tradition surrounding the idea of notice as the guiding principle of our pleading system.

Unfortunately, the continued exaltation of notice as the overarching value that animates our system of pleading is problematic because it obfuscates what the more relevant values may be and confuses courts and litigants about what level of factual detail a complaint should have. When courts emphasize the notice function of pleading as the sine qua non of a complaint as a prelude to the consideration of a motion to dismiss for failure to state a claim, one of two errors can occur: a court may approve the complaint solely because it successfully provides notice, even though it might fail in *Twombly* terms, or a court may reject the complaint nominally on failure-of-notice grounds when the truth is that the dismissal was for substantive insufficiency. Both errors confuse future litigants by muddling the standard with irrelevant notice-speak in a way that takes our eye off the real

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102. Clark described “the notice function of pleading” as follows:

As probably all will concede, there is a certain minimum which can be expected of pleadings. They must sufficiently differentiate the situation of fact which is being litigated from all other situations to allow of the application of the doctrine of res judicata, whereby final adjudication of this particular case will end the controversy forever. As a natural corollary, they will also show the type of case brought, so that it may be assigned to the proper form of trial, whether by the jury in negligence or contract, or to a court, referee, or master, as in foreclosure, divorce, accounting, and so on.

Charles E. Clark, *Simplified Pleading*, 2 F.R.D. 456, 456–57 (1943). He went on to emphasize his view that “[t]he continuous experience from common-law pleading down through the reversions to pleading formalities under code pleading indicates the necessity of keeping clearly in mind the limited, but important, purposes of pleading and how they cannot be pressed wisely beyond such purposes.” *Id.* at 460.

103. 355 U.S. at 41, 47 (1957).

104. See, e.g., *Brownlee v. Conine*, 957 F.2d 353, 354 (7th Cir. 1992) (“The Federal Rules of Civil Procedure establish a system of notice pleading rather than of fact pleading . . .”); *Oil, Chem. & Atomic Workers Int’l Union v. Delta Ref. Co.*, 277 F.2d 694, 697 (6th Cir. 1960) (“Under the notice system of pleading established by the Rules of Civil Procedure, . . . the ancient distinction between pleading ‘facts’ and ‘conclusions’ is no longer significant.”).

105. The Court in *Twombly* favorably cited *Conley*’s statement regarding the notice function of pleading, see 550 U.S. 544, 555 (2007), and reiterated this view in *Erickson v. Pardus*, 551 U.S. 89 (2007) (per curiam).

issue: whether sufficient facts and supported implications were offered to present a plausible claim.

Equally important, though, is that the focus on notice distracts us from identifying the real underlying values of pleading doctrine. This was a big problem prior to *Twombly* because before that case the Supreme Court strongly propounded the notice rationale in cases like *Leatherman* and *Swierkiewicz* while lower courts imposed heightened pleading requirements with other values in mind.<sup>106</sup> As mentioned, the Court continues to recite the notice value as it emphasizes other values such as efficiency. But to the extent that notice turns out to have little to do with explaining the Court's plausibility approach to pleading, little light is shone on more pertinent values and lower courts are led to continue peddling the idea that notice is what pleading is all about.<sup>107</sup>

### B. Efficiency

Does efficiency—meaning consideration of prospective costs to litigants and the courts versus anticipated benefit—fare better as a value that explains post-*Twombly* pleading doctrine? The Court certainly made efficiency concerns a prominent feature of its explanation of its retooling of pleading doctrine in *Twombly*.<sup>108</sup> Indeed, efficiency concerns and the need to show plausible entitlement to relief are intimately connected. Claims that present factual scenarios that fail to overcome the presumption of propriety are those that raise efficiency red flags. This is so because in such instances the court is confronted with a claimant who has offered no indication of

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106. See Fairman, *supra* note 7, for a discussion of lower court imposition of heightened pleading requirements. See also Spencer, *Pleading Civil Rights Claims*, *supra* note 24.

107. *Phillips v. County of Allegheny*, 515 F.3d 224 (3d Cir. 2008), provides the most explicit example of the infusion of the notice rationale into the substantive sufficiency analysis:

Fair notice under Rule 8(a)(2) depends on the type of case—some complaints will require at least some factual allegations to make out a “showing that the pleader is entitled to relief, in order to give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.” Indeed, taking *Twombly* and the Court’s contemporaneous opinion in *Erickson v. Pardus* together, we understand the Court to instruct that a situation may arise where, at some point, the factual detail in a complaint is so undeveloped that it does not provide a defendant the type of notice of claim which is contemplated by Rule 8.

*Id.* at 232 (citations omitted).

108. *Twombly*, 550 U.S. at 557–58 (“[S]omething beyond the mere possibility of loss causation must be alleged, lest a plaintiff with ‘a largely groundless claim’ be allowed to ‘take up the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value.’” (quoting *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 347 (2005))); *id.* at 558 (“[W]hen the allegations in a complaint, however true, could not raise a claim of entitlement to relief, ‘this basic deficiency should . . . be exposed at the point of minimum expenditure of time and money by the parties and the court.’”) (citation omitted); *id.* (“[P]roceeding to antitrust discovery can be expensive. . . . [A] district court must retain the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed.”) (quoting *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 528 n.17 (1983))); *id.* at 559 (“[I]t is only by taking care to require allegations that reach the level suggesting conspiracy that we can hope to avoid the potentially enormous expense of discovery in cases with no ‘reasonably founded hope that the [discovery] process will reveal relevant evidence’ to support a § 1 claim.”) (citation omitted).

entitlement to relief, which makes the value of the anticipated benefit low if not negligible compared with the cost in time and expense to the court and to other litigants. If the interests of efficient judicial administration—preserving scarce judicial resources for the prosecution of claims that display some indicia of merit and minimizing the expenditure of private resources on what seems likely to be a fruitless pursuit—are a court's goal, then pleading standards must permit such a cost-benefit calculation to be made and to be made early in the process.<sup>109</sup> The presumption of propriety and the need to muster facts and supported implications to overcome that presumption directly serve this screening function by ensuring that claims gaining access to the system are only those whose anticipated benefit is demonstrably sufficient to warrant proceeding with the case given its expected costs.

Keep in mind that by “anticipated benefit” I am not referring to the prospective monetary award associated with a claimant victory. Instead, the term is used here to refer to the prospect of a claimant victory itself. Thus, the plausibility standard is not meant to aid in a raw cost-benefit analysis that weighs cost to the defendants and the court against the anticipated winnings of the plaintiff, and, indeed, the standard is not equipped to do so. Rather, the doctrine—at least as stated—attempts to screen only for likelihood of merit. Thus, whether the threshold of plausibility is surpassed as a doctrinal matter should not have anything to do with the magnitude of either the expected cost to the litigants or the financial benefit accruing to the victor.<sup>110</sup> This should be contrasted with a proportionality analysis such as one finds in the federal discovery rules, wherein the court is authorized to weigh the anticipated value of requested discovery against the burden and cost associated with production.<sup>111</sup> In that context, the court places a value on the anticipated information and judges its sufficiency in the face of a professed degree of burden or expense. In the pleading context, the plausibility standard is not itself a mere exercise in cost-benefit analysis as with discovery; the court does not value the claimant's case and compare it with costs but merely assesses the claim's potential merit.

It is clear, then, that the requirement of plausibility—defined here as a statement of facts and supported propositions that possess a presumption of impropriety—derives, in part, from the interest in promoting efficient use of resources and sound judicial administration. Is pleading doctrine properly

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109. *Id.* at 558 (“[W]hen the allegations in a complaint, however true, could not raise a claim of entitlement to relief, ‘this basic deficiency should . . . be exposed at the point of minimum expenditure of time and money by the parties and the court.’”) (citation omitted).

110. That said, at least some courts have gone so far as to suggest that the prospective cost of discovery is relevant to determining the level of factual detail needed in a complaint. *See, e.g.,* *Limestone Dev. Corp. v. Vill. of Lemont, Ill.*, 520 F.3d 797, 803–04 (7th Cir. 2008) (“If discovery is likely to be more than usually costly, the complaint must include as much factual detail and argument as may be required to show that the plaintiff has a plausible claim.”).

111. FED. R. CIV. P. 26(b)(2)(C) (“[T]he court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that . . . the burden or expense of the proposed discovery outweighs its likely benefit . . .”).

called on to vindicate these interests? The answer to this question depends on what is gained and what is lost when pleadings are conscripted into such service. The hoped-for gains are the avoidance of economic waste and the freeing up of courts to adjudicate valid disputes. The potential losses, though, could be the frustration of valid claims and the elimination of a grievant's day in court. How one assesses these potential downsides to the pursuit of efficiency depends on how the third value we will consider, justice, is conceived.

### C. Justice

Justice in the pleading context can refer to two things. First, it can simply be a way to refer to the value of *accuracy*, which in turn refers to judicial outcomes that properly label claims as meritorious or meritless. Processes that permit meritorious claims to be vindicated and meritless claims to be thwarted are just in the sense that they accurately resolve disputes and distribute or redistribute wealth and burdens accordingly. The second and equally important sense of the term justice refers to the value of *procedural fairness*, meaning that the procedure established to resolve a dispute permits the aggrieved and the accused to participate in the proceedings and have their claims and defenses heard and resolved in a fair manner. Processes that promote litigant access, permit the discovery of supporting evidence, and call for resolution by an impartial decisionmaker can be viewed as procedurally just regardless of the accuracy of the result.<sup>112</sup>

We ask, then, "Does contemporary pleading doctrine have justice (as defined above) as a core value?" To the extent the plausibility standard prevents *meritless* claims from going forward and thus from wasting the time and money of courts and defendants, the standard promotes accuracy of outcomes. However, if the standard prevents litigants from accessing the system and being given a chance to support and present their claims, one could argue that procedural fairness will be compromised. Although accurate results may be thought to trump procedural fairness, to the extent claimants interpret the process as one that prevented their participation, they are certain to develop doubts about its legitimacy.<sup>113</sup> Conversely, to the extent the plausibility standard prevents *meritorious* claims from proceeding,

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112. It is acknowledged that not all legal systems around the world provide for liberal pleading standards or party-directed discovery. *See, e.g.*, ALI/UNIDROIT PRINCIPLES AND RULES OF TRANSNATIONAL CIVIL PROCEDURE, Principle 11.3 (Proposed Final Draft 2004) ("In the pleading phase, the parties must present in reasonable detail the relevant facts, their contentions of law, and the relief requested, and describe with sufficient specification the available evidence to be offered in support of their allegations."). Here, I am not equating a specific pleading regime and party-directed discovery with procedural justice; rather, some means of litigant access to courts and some mechanism for obtaining and presenting information helpful to one's case are, it seems to me, more fundamentally connected with the notion of procedural fairness. *See, e.g., id.* at Principle 16.1 ("Generally, the court and each party should have access to relevant and nonprivileged evidence . . .").

113. Professor Lawrence Solum discusses the relationship between the value of participation and the legitimacy of court judgments in his article *Procedural Justice*, 78 S. CAL. L. REV. 181, 275 (2004). *Id.* ("Participation is essential for the normative legitimacy of adjudication processes . . .").



both accuracy and procedural fairness are undermined. The question then is this: What is the risk that requiring the allegation of facts and supported implications at the pleading stage will either ensnare valid claims or dispose of invalid claims before plaintiffs develop a sense of participation?

The answer is likely illusive because it is unknowable whether a dismissed claim was nonetheless meritorious in an absolute sense. Neither can we know with any certainty the degree to which premature dismissals of invalid claims undermine the public's sense of the system's procedural fairness and how that may impact its perceived legitimacy. What we can assess, however, is whether plausibility pleading has an inherent bias in any particular direction. We can do this by scrutinizing whether the components of the pleading standard—a need for facts and supported implications—are designed to screen out meritless claims only or if they punish failures that could characterize meritless and meritorious claims alike.

As it turns out, statements of claims can easily run afoul of the plausibility standard even though a valid claim may exist. Antitrust conspiracy claims provide a ready example. If an unlawful agreement to fix prices has in fact been made, but this fact has been concealed from the world, then plaintiffs complaining to have suffered harm as a result of this conspiracy might have valid claims, but they cannot properly show their entitlement to relief absent facts evidencing the agreement<sup>114</sup> or facts supporting the inference of an agreement.<sup>115</sup> The same can be said of a discrimination claim. An employer may have indeed fired an employee for unlawful reasons but if the plaintiff lacks evidence of that motivation or facts supporting the inference of discrimination,<sup>116</sup> his mere suspicion of the same will not permit his claim to go forward. Indeed, in any case depending on subjective motivation or concealed activities the plausibility pleading standard will not necessarily accurately identify claims that truly lack merit. Rather, they will identify claims whose merit depends on information the plaintiff may not yet have.

It seems, then, that plausibility pleading is overinclusive in that it potentially keeps valid claims from entering the system.<sup>117</sup> As such, the standard

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114. See *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007) (“[S]tating [a Sherman Act] claim requires a complaint with enough factual matter (taken as true) to suggest that an agreement was made.”).

115. See *id.* at 556 n.4 (stating that “‘complex and historically unprecedented changes in pricing structure made at the very same time by multiple competitors, and made for no other discernible reason,’ would support a plausible inference of conspiracy”) (citation omitted).

116. An example of supporting but indirect evidence of discriminatory motives may be the termination of only Muslim employees immediately following the employer's questioning of all employees about their religious affiliation. In such a case, the implication of discrimination is supported by the facts.

117. As I noted in my earlier work:

A *Twombly* dismissal is nothing more than a speculative assessment that the plaintiff is unlikely—in the view of the court—to be able to identify facts through discovery that will support a claim. Permitting that assessment—rather than the stronger assessment that no set of facts could be proved that would entitle the pleader to relief—means that the motion to dismiss will weed out claims that are merely suspected of lacking merit rather than reserving dismissal only for those claims that are certain to lack merit.

cannot be said to be primarily oriented toward the promotion of just outcomes. That does not mean that justice—at least in the sense of accuracy—is not one of its goals; the requirement of facts plus supported inferences does bear some relation to prospective merit. The problem is simply that the standard is not sufficiently calibrated to perceive merit but rather is designed more for the purpose of protecting scarce economic and judicial resources from waste. In short, in the competition between efficiency and justice, plausibility pleading is designed to err on the side of efficiency.<sup>118</sup> Not that the “no set of facts” standard was precise in its labeling of claims as meritorious or meritless. To the contrary, that standard was underinclusive in that it permitted invalid claims to go forward, exalting procedural fairness (access) over efficiency.<sup>119</sup> Which values should take precedence is a policy question that depends on whether one prioritizes the need to minimize the waste of judicial and economic resources over the need to permit litigant access and ensure accurate outcomes.<sup>120</sup> By developing the plausibility pleading standard—buttressed with several references to efficiency concerns along the way—the Supreme Court in *Twombly* seems to have determined that efficiency is the priority.<sup>121</sup>

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Spencer, *Pleading Civil Rights Claims*, *supra* note 24, at 160.

118. From a utilitarian perspective, this would not be a problem, so long as the overall benefit gained by screening out meritless claims outweighed the costs of blocking meritorious claims. Professor Bone emphasizes this point:

[I]t makes no sense [under a utilitarian] view to object to a strict pleading or other screening rule on the sole ground that it screens desirable lawsuits, including suits in which the defendant actually violated the law and the plaintiff could prove it with access to discovery. It depends on how many desirable and undesirable lawsuits are screened, the relative costs of the two types of error [i.e. false positives and false negatives], and the expected process costs of administering the rule. At least in theory, a strict pleading rule might be optimal even if it screened a large number of desirable suits.

Bone, *supra* note 86, at 912.

119. Professor Bone aptly described this shortcoming of what he labeled “the possibility standard”:

The problem, however, is that a possibility standard tolerates complaints that do no more than describe conduct within the ordinary baseline of acceptable behavior. A complaint of this sort gives the defendant no better reason to defend than no complaint at all. In other words, if possibility pleading is sufficient, a defendant acting perfectly appropriately could be forced to bear the burden of a defense without the plaintiff offering a good reason why he should do so.

*Id.* at 906.

120. The Federal Rules seem to contemplate a balancing of the competing values of efficiency and justice, rather than the prioritization of one over the other. *See* FED. R. CIV. P. 1 (“These rules . . . should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding.”).

121. Professor Bone seems to suggest that there is nothing inherently problematic about setting the pleading standard at a level that screens out meritorious claims but there is a problem with developing such a standard through adjudication rather than the formal rulemaking or legislative process. Bone, *supra* note 86, at 918 (“The normative stakes involved in screening *meritorious* suits are complex and highly contested. This favors a decisionmaking process that is more open to broad-based public input and more conducive to debate than case-by-case adjudication.”).

## IV. EVALUATING PLEADING DOCTRINE

The fullness of the presumption-based theory of pleading is now before us: properly stating a claim requires the allegation of objective facts and supported implications that give rise to a presumption of impropriety. Further, the core rationale for this approach is that it promotes the value of efficiency—the minimization of economic and judicial waste. We now turn to an evaluation of contemporary pleading doctrine so described, focusing here on the doctrine's chosen balance between efficiency and justice, and the impact of context on what the doctrine requires of pleadings in any given case.<sup>122</sup>

A. *Balancing Efficiency and Justice*

The basic contours of this topic were discussed in the previous Section. Here, rather than thinking about whether and to what extent the values of justice and efficiency are promoted by contemporary pleading doctrine, I will offer a critique of the balance between the two values the doctrine has struck. As was noted above, efficiency concerns are preferenced under the current theory of pleading, as justice concerns (access and procedural fairness) were privileged under the prior “no set of facts” version of the doctrine. But privileging efficiency at the potential expense of frustrating or discouraging valid claims is dubious for two reasons.

First, although it is true that terminating a case at the pleading stage saves the court enormous time and keeps defendants from having to spend money on costly discovery, there are inefficiencies that result from the *Twombly* approach that warrant consideration. The lack of clarity and precision described in Part I above will inevitably mean that courts will apply pleading doctrine in varying and inconsistent ways. Incoherence from the courts has the potential to create an unpredictability that will underdeter frivolous claims and overencourage motions to dismiss. The litigation of motions to dismiss is not a cost-free affair for any of the parties involved, thus detracting to some degree from the savings gained by forgoing discovery. In the event that the motion is denied and discovery ensues, litigating the motion has only added to the time and expense associated with the litigation rather than yielding any savings.

Second and more importantly, a standard that dismisses valid claims at the very front end of the system based on an inability to offer facts that claimants are, at this early stage, unlikely or unable to know blocks access to the courts in a way that is fundamentally improper. To see this, let us go back to the basic negligence claim represented in Form 11. That form reveals that pleading facts that establish the defendant's negligence—such as the defendant's use of a cell phone while driving, operation of the vehicle at excessive speed, or failure to wear required prescription spectacles—are not

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122. Although the focus here is on evaluating pleading doctrine along the lines noted, I offer a full critique of all of the problems with the doctrine emerging from *Twombly* in my earlier work, *Plausibility Pleading*, *supra* note 22.

necessary to state a claim. As we have already discussed, this is so in part because the surrounding fact of the collision itself creates a presumption of impropriety that gives the plaintiff a right to proceed to discovery where he has a good chance of substantiating his initial charge of negligent conduct. But Form 11 does not require plaintiffs to allege such facts also because they are facts the plaintiff may not be able to know prior to discovery. Certainly a plaintiff who is hit from behind by a car cannot state information pertaining to the driver's conduct inside the car that might have contributed to the accident. If the form did require plaintiffs to plead such information, there would be no way for unwitting victims who are blindsided by wayward vehicles to state their claims in a manner that would be sufficient in the eyes of the court. Under such circumstances, the pleading rule would be a bar to court access for claimants with legitimate grievances. Such a bar would seem to violate the fundamental right of access to courts<sup>123</sup> protected on the federal level by the Petition Clause of the First Amendment.<sup>124</sup>

Although it can be said—with some confidence—that the protection of the Petition Clause extends to the filing of a complaint,<sup>125</sup> less certain is the scope of this protection. The Supreme Court in *Bill Johnson's Restaurants, Inc. v. NLRB*<sup>126</sup> indicated that the First Amendment does not protect the filing of “suits based on insubstantial claims” or “suits that lack . . . a ‘reasonable basis’”:

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123. As Professor Carol Rice Andrews astutely points out in her article *A Right of Access to Court Under the Petition Clause of the First Amendment: Defining the Right*, 60 OHIO ST. L.J. 557, 563 (1999), Chief Justice Marshall in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), noted the fundamental nature of the right to claim the law's protection when one receives an injury:

The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives injury. One of the first duties of government is to afford that protection. . . . “[I]t is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit or action at law, whenever that right is invaded.”

*Marbury*, 5 U.S. at 163.

124. U.S. CONST. amend. I (“Congress shall make no law . . . abridging . . . the right of the people . . . to petition the Government for a redress of grievances.”); *see also* Cal. Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 513 (1972) (stating that the First Amendment serves as the constitutional basis for the right of access to courts). The Court spoke of the importance of the right to sue in *Chambers v. Baltimore & Ohio Railroad Co.*, 207 U.S. 142 (1907): “The right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government. It is one of the highest and most essential privileges of citizenship . . .” *Id.* at 148. In *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731 (1983), the Supreme Court affirmed that “the right of access to the courts is an aspect of the First Amendment right to petition the Government for redress of grievances.” *Id.* at 741; *see also* *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 897 (1984) (“The First Amendment right protected in *Bill Johnson's Restaurants* is plainly a ‘right of access to the courts . . . for redress of alleged wrongs.’” (quoting *Bill Johnson's Rests.*, 461 U.S. at 741)). Another line of cases, beginning with *Boddie v. Connecticut*, 401 U.S. 371 (1971), made it clear that the Due Process Clause supplied only a very narrow right of access for plaintiffs, primarily when the vindication of another fundamental right is at stake and the plaintiff has no alternative means of vindicating that right. *Id.* at 392–93 (invalidating a Connecticut filing fee for divorce actions, as applied to an indigent plaintiff, because it impermissibly infringed on the due process right to obtain a divorce).

125. *McDonald v. Smith*, 472 U.S. 479, 484 (1985) (“[F]iling a complaint in court is a form of petitioning activity . . .”).

126. 461 U.S. 731 (1983).

Such suits are not within the scope of First Amendment protection: “The first amendment interests involved in private litigation—compensation for violated rights and interests, the psychological benefits of vindication, public airing of disputed facts—are not advanced when the litigation is based on intentional falsehoods or on knowingly frivolous claims. Furthermore, since sham litigation by definition does not involve a bona fide grievance, it does not come within the first amendment right to petition.”<sup>127</sup>

The Court went on to hold that “baseless litigation is not immunized by the First Amendment right to petition.”<sup>128</sup> The key issue for our present discussion, then, is whether contemporary pleading doctrine, as described by the presumption-based theory outlined above, is reasonably tailored to screen out “baseless litigation” or impermissibly obstructs potentially valid claims. More specifically, though it seems clear that a hypothetical pleading rule that required claimants to allege unknowable facts pertaining to a defendant’s negligence in a car accident would be certain to prevent valid negligence claims from accessing the judicial system, does the same analysis hold true for the post-*Twombly* approach to pleading, in at least some cases?

If allegations attempt to attach liability to factual scenarios that are not presumptively improper, and overcoming that presumption and properly stating a claim requires the addition of facts that the plaintiff cannot know *ex ante*, the pleading standard presents an insurmountable barrier to access in certain cases. We have already noted above that the cases facing this challenge seem to be those for which subjective motivations or concealed conditions or activities are key to establishing liability—such as discrimination, antitrust, conspiracy, and products-liability claims. If a person has in fact been fired for an illegitimate reason, but such motivation is revealed only in documents that the plaintiff has not seen or is known only by witnesses the plaintiff has yet to depose, that person has a valid grievance that the current interpretation of Rule 8 will not allow into the courts.

*Marrero-Gutierrez v. Molina*<sup>129</sup> provides an example.<sup>130</sup> In that case, the plaintiff, a former government employee, claimed in her complaint that she was fired from her job because of her membership in the New Progressive Party (NPP): “From or about November 2000, to the present time, defendants have performed, fostered, and encouraged the continuous persecution, harassment, transfers, reprisals and demotions of Marrero and [co-plaintiff], because of plaintiffs’ affiliation with the NPP . . . .”<sup>131</sup> In support of her claim that her demotion and termination were motivated by political animus to-

127. *Id.* at 743 (quoting Thomas A. Balmer, *Sham Litigation and the Antitrust Laws*, 29 *BUFF. L. REV.* 39, 60 (1980)).

128. *Id.*

129. 491 F.3d 1 (1st Cir. 2007).

130. The following discussion of *Marrero-Gutierrez v. Molina* is taken from my previous writing, *Pleading Civil Rights Claims*, *supra* note 24, at 141–42.

131. Amended Complaint at ¶ 31, *Marrero-Gutierrez v. Molina*, No. 03-1256 (July 19, 2004) (on file with author).

ward her party membership, the plaintiff alleged that she held a conflicting party membership from the defendants;<sup>132</sup> that the defendants “created and encouraged a hostile working environment against plaintiff . . . denying her of equal treatment with other employees [in various enumerated ways]”;<sup>133</sup> that her supervisor “started a pattern of insults against [the plaintiff] . . . and ‘her group,’ . . . the New Progressive Party”;<sup>134</sup> and that the defendants conspired to humiliate her, foster insubordination toward her, reassigned her duties to others in the department, and ultimately terminated her all as part of discriminatory political “persecution.”<sup>135</sup> Although the First Circuit panel acknowledged that such allegations supported “a [causal] connection [a]s one among a myriad of possible inferences,” drawing that inference, in light of *Twombly*, would be too “speculative”: “Merely juxtaposing that she is an active member of the NPP and that the defendants are affiliated with the [rivaling Popular Democratic Party] is insufficient, standing alone, to create a causal link.”<sup>136</sup>

Assuming the plaintiff here alleged all of the relevant facts that she had at her disposal, there was not more she could offer in support of her claim absent discovery. And the factual scenario presented certainly would seem to at least raise a suspicion of improper conduct, even if there could be perfectly legitimate explanations for what transpired. Under such circumstances, it seems inappropriate to terminate the plaintiff’s claim, given that it is not clearly or even probably “baseless,” meritless, or lacking a “reasonable basis.” Similar examples exist in civil rights<sup>137</sup> and other contexts<sup>138</sup> as well.

It seems, then, that requiring particularized pleading in these types of cases effectively prevents some claimants from seeking redress for what

132. *Id.* ¶¶ 28–29.

133. *Id.* ¶ 41.

134. *Id.* ¶ 42.

135. *Id.* ¶¶ 43–59.

136. *Marrero-Gutierrez v. Molina*, 491 F.3d 1, 10 (1st Cir. 2007) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007)).

137. In *Pleading Civil Rights Claims* I offered several examples of cases where the courts dismissed claims even though the factual allegations created a legitimate suspicion of wrongdoing. See Spencer, *Pleading Civil Rights Claims*, *supra* note 24, at 141–42.

138. In *Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042, 1045 (9th Cir. 2008), the following allegations were deemed insufficient to state an antitrust conspiracy claim:

(1) [E]ach Bank defendant “participates in the management of and has a proprietary interest in” the Consortiums [MasterCard and Visa]; (2) the Banks charge appellants “the amount of the interchange rate fixed by the Consortiums as the merchant discount fee”; (2) [sic] the Banks adopt the interchange fees set by the Consortiums; (3) the acquiring banks “knowingly, intentionally and actively participated in an individual capacity with the Consortiums in charging the fixed minimum merchant discount fees”; and (4) there is an agreement among all financial institutions to charge a minimum merchant discount fee set by the Consortiums.

*Id.* at 1048. The court dismissed the allegation of knowing, intentional, and active participation by the Banks in the fee-fixing scheme as “nothing more than a conclusory statement” and found that “the complaint does not answer the basic questions: who, did what, to whom (or with whom), where, and when?” *Id.*

could be legitimate grievances.<sup>139</sup> If the constitutional line is drawn at permitting procedural rules to bar “baseless” claims that lack a “reasonable basis”<sup>140</sup>—a line that admittedly has not been definitively drawn by the Court—then the line drawn by contemporary pleading doctrine is inapt in certain cases. Reforming the doctrine to relieve plaintiffs of the obligation to allege the specifics underlying subjective motivations or concealed conditions or activities might be one way to remedy the imbalance.<sup>141</sup> However, crafting a rule or standard that did not err too much in the opposite direction—the acceptance of thin claims that result in the imposition of exorbitant discovery costs on defendants—would be a serious challenge.

Thus, a better approach might be to permit judges to identify those cases where additional facts are needed to support the needed inference and reserve judgment on the motion to dismiss until after limited, focused discovery on that issue can occur.<sup>142</sup> If enough facts to support the inference cannot be uncovered after this mini-discovery process, then the claim may be dismissed with more confidence that a meritless claim was turned away. Expanding claimant access to presuit discovery would serve a similar func-

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139. Although here I focus on the fundamental impropriety of a pleading standard that blocks access to courts in circumstances where a plaintiff cannot know the information she is being asked to allege, such a standard can also be criticized more directly in economic terms:

If the operative pleading standard required plaintiff to allege facts that she cannot reasonably be expected to know at the case's inception, this informational asymmetry would in turn prevent proper functioning of the litigation market. The plaintiff's failure to plead unknowable facts could in some cases result in dismissal of a claim that should have been successful, and net social welfare decreases as the defendant unjustly retains wealth that should have compensated plaintiff for her injury.

Paul J. Stancil, *Balancing the Pleading Equation* 28 (Ill. Law & Econ. Research Papers Series, Research Paper No. LE08-018, 2008), available at [http://papers.ssrn.com/pape.tar?abstract\\_id=1266323](http://papers.ssrn.com/pape.tar?abstract_id=1266323).

140. *Bill Johnson's Rests., Inc. v. NLRB*, 461 U.S. 731, 743 (1983).

141. Rule 9(b) does provide that “[m]alice, intent, knowledge, and other conditions of a person's mind may be alleged generally,” FED. R. CIV. P. 9(b), but this has not prevented courts from demanding facts that substantiate allegations of discriminatory motive. In any event, a rule along the same lines that incorporated other matters that may be alleged generally—such as discriminatory motive or the existence of a secret agreement—might help bring pleading doctrine closer to permitting potentially valid claims to proceed.

142. One could argue that judges already have the authority to tailor discovery in this way via their authority under Rule 26. Justice Stevens reasoned thusly in his *Twombly* dissent:

Rule 26 confers broad discretion to control the combination of interrogatories, requests for admissions, production requests, and depositions permitted in a given case; the sequence in which such discovery devices may be deployed; and the limitations imposed upon them. Indeed, Rule 26(c) specifically permits a court to take actions “to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense” by, for example, disallowing a particular discovery request, setting appropriate terms and conditions, or limiting its scope.

550 U.S. 544, 594 n.13 (2007) (Stevens, J., dissenting) (citing *Crawford-El v. Britton*, 523 U.S. 574, 598–99 (1998)). Rule 16 gives judges relevant authority over discovery as well. *See* FED. R. CIV. P. 16(c)(2)(F) (giving courts the authority to take appropriate action with respect to “controlling and scheduling discovery, including orders affecting disclosures and discovery under Rule 26 and Rules 29 through 27”).

tion.<sup>143</sup> Another possibility would be to hold counsel to their obligation under Rule 11 to certify that the factual contentions “will likely have evidentiary support after a reasonable opportunity for further investigation or discovery.”<sup>144</sup> That means making plaintiffs’ counsel accountable for sanctions in the event that discovery reveals that the claim was baseless in a way that counsel should have, *ex ante*, been able to detect. A court’s authority to manage a case under Rule 16 could be invoked to aid in these efforts as well, although the *Twombly* Court seemed skeptical of a judge’s ability to use such authority profitably in this regard.<sup>145</sup>

Finally, reforming the American Rule<sup>146</sup> in a way that puts more pressure on plaintiffs to bring forward only those claims they can support might stem the tide of meritless claims that a more permissive pleading rule might encourage, although any cost-shifting reform would have to be careful not to chill the claims of legitimate grievants.<sup>147</sup> Alternatively, plaintiffs could be charged with shouldering the cost of any limited, preliminary discovery the court decides to allow to determine the potential merit of their claims. Assessing the merits of these and other potential means of revising pretrial procedures to better distinguish valid from meritless claims is beyond the scope of this Article and will thus have to be the work of future scholarly inquiry. Suffice it to say here that there are ways that pleading doctrine could be reformed and that other procedural devices could be employed to better serve the interests of justice—both in the sense of accuracy and in the sense of procedural fairness—and better protect the right to access enshrined in the Petition Clause.

143. The Federal Rules provide for prefilng discovery but have been generally interpreted to preserve only testimony that is at risk of being unavailable once an action is commenced. *See Penn Mut. Life Ins. Co. v. United States*, 68 F.3d 1371, 1373 (D.C. Cir. 1995) (“Unlike other discovery rules, Rule 27(a) allows a party to take depositions *prior* to litigation if it demonstrates an expectation of future litigation, explains the substance of the testimony it expects to elicit and the reasons the testimony is important, and establishes a risk that testimony will be lost if not preserved.”). Professor Lonny Hoffman discusses presuit discovery on the federal and state level in *Using Presuit Discovery to Overcome Barriers to the Courthouse*, 34 *LITIG.* 31 (2008). *See also* Bone, *supra* note 86, at 934–35 (discussing postfiling, predissmissal discovery, something he refers to as “pleading stage discovery”).

144. FED. R. CIV. P. 11(b)(3).

145. Justice Stevens, in his dissent, was more confident and pointed to authority under Rule 16 and other rules to manage cases in a way that would minimize the potential abuses identified by the *Twombly* majority. *See Twombly*, 550 U.S. at 593–94 n.13 (Stevens, J., dissenting) (“The Court vastly underestimates a district court’s case-management arsenal. Before discovery even begins, the court may grant a defendant’s Rule 12(e) motion; Rule 7(a) permits a trial court to order a plaintiff to reply to a defendant’s answer, and Rule 23 requires ‘rigorous analysis’ to ensure that class certification is appropriate. Rule 16 invests a trial judge with the power, backed by sanctions, to regulate pretrial proceedings via conferences and scheduling orders . . .”) (citations omitted).

146. The “American Rule” provides that parties bear their own litigation expenses. *Alyeska Pipeline Serv. Co. v. Wilderness Soc’y*, 421 U.S. 240 (1975) (indicating that the American Rule applies not only to attorney’s fees but also to other costs of litigation, including expert-witness fees and miscellaneous costs such as transcripts and duplication).

147. For a discussion of the impact of moving to the English Rule or a “loser pays” system, *see* Marie Gryphon, *Greater Justice, Lower Cost: How a “Loser Pays” Rule Would Improve the American Legal System*, MANHATTAN INSTITUTE CENTER FOR LEGAL POLICY CIVIL JUSTICE REPORT, Dec. 2008.



### B. Pleading and Context

Many of the courts that have considered *Twombly*'s standard have expressed the view that the case propounds a context-dependent approach to pleading,<sup>148</sup> but have not always articulated specifically how context affects the level of facts that must be alleged.<sup>149</sup> As the Seventh Circuit remarked, "[H]ow many facts are enough will depend on the type of case. In a complex antitrust or RICO case a fuller set of factual allegations than found in the sample complaints in the civil rules' Appendix of Forms may be necessary to show that the plaintiff's claim is not 'largely groundless.'"<sup>150</sup>

Indeed, pleading doctrine as described by the theory set forth above is context dependent, meaning the level of factual detail needed to get to a presumption of impropriety will vary depending on the factual and legal context of the claim. For example, a claim asserting trespass on one's property will possess a presumption of impropriety by simply stating the fact of the plaintiff's ownership of the property and the defendant's unconsented-to, harmful intrusion on the same.<sup>151</sup> These facts, if true, outline a scenario that suggests the liability of the defendant for the trespass alleged. The defendant may have competing facts that would dispute whether an intrusion had occurred or that it was done without permission, but those are considerations not relevant at the pleading stage in light of the assumption-of-truth rule.

148. See, e.g., *Breaux v. Am. Family Mut. Ins. Co.*, 554 F.3d 854, 862 (10th Cir. 2009) ("The degree of specificity needed to establish plausibility and fair notice, and the need for sufficient factual allegations depend upon the context of the case."); *Ross v. Bank of Am., N.A. (USA)*, 524 F.3d 217, 225 (2d Cir. 2008) ("We recognize that *Bell Atlantic Corp. v. Twombly* requires a heightened pleading standard 'in those contexts where [factual] amplification is needed to render [a] claim plausible,' including, most notably, the antitrust context." (quoting *Iqbal v. Hasty*, 490 F.3d 143, 158 (2d Cir. 2007))); *Robbins v. Oklahoma*, 519 F.3d 1242, 1247 (10th Cir. 2008) ("The Third Circuit has noted, and we agree, that the degree of specificity necessary to establish plausibility and fair notice, and therefore the need to include sufficient factual allegations, depends on context. . . ."); *Phillips v. County of Allegheny*, 515 F.3d 224, 232 (3d Cir. 2008) ("[T]he *Twombly* decision focuses our attention on the 'context' of the required short, plain statement. Context matters in notice pleading. Fair notice under Rule 8(a)(2) depends on the type of case . . . ."); *Kelley v. N.Y. Life Ins. & Annuity Corp.*, No. 07-cv-01702-LTB-BNB, 2008 WL 1782647, at \*3 (D. Colo. Apr. 17, 2008) ("[T]he determination of whether a complaint contains enough allegations of fact to state a claim to relief that is plausible on its face is dependent on the context of the claim raised."); see also *Twombly*, 550 U.S. at 580 n.6 (Stevens, J., dissenting) ("The majority is correct to say that what the Federal Rules require is a 'showing' of entitlement to relief. Whether and to what extent that 'showing' requires allegations of fact will depend on the particulars of the claim.") (citation omitted).

149. The Tenth Circuit provided some specifics regarding how context affects the needed facts in *VanZandt v. Oklahoma Dep't of Human Services*, 276 F. App'x 843, 847 (10th Cir. 2008) ("[T]he degree of specificity necessary to establish plausibility and fair notice is dependent on the context of the case involved. . . . [I]n the context of a case involving qualified immunity, plaintiffs must allege facts sufficient to show that the defendants violated their constitutional rights, and that those rights were clearly established at the time.").

150. *Limestone Dev. Corp. v. Vill. of Lemont, Ill.*, 520 F.3d 797, 803 (7th Cir. 2008) (citing *Phillips v. County of Allegheny*, 515 F.3d 224, 231–32 (3d Cir. 2008)).

151. See, e.g., *Innis Arden Golf Club v. Pitney Bowes, Inc.*, 514 F. Supp. 2d 328, 337 (D. Conn. 2007) ("In Connecticut, the elements of a trespass action are: '(1) ownership or possessory interest in land by the plaintiff; (2) invasion, intrusion, or entry by the defendant affecting the plaintiff's exclusive property interest; (3) done intentionally; and (4) causing direct injury.'") (citation omitted).

This contrasts with an antitrust conspiracy claim, where the mere description of objective facts such as noncompetition, similar pricing, or parallel behavior by competitors would not suffice to create a presumption of impropriety. An antitrust conspiracy claim depends on the existence of an agreement to which the plaintiff was not a party. Thus, the mere assertion of an agreement will be a supposition that is not necessarily implied from the objective facts alleged. Additional facts—such as the existence of meetings or documents supporting the idea that an agreement was reached—are needed to make the supposition a supported implication.<sup>152</sup>

What characteristics distinguish those claims requiring the pleading of few facts from those requiring additional factual detail? The key dividing line seems to be between claims that require suppositions to connote wrongdoing and those based on facts that indicate impropriety on their own. For example, contract claims appear to be the kind of claim for which suppositions are not necessary to state a valid claim. To prove a breach-of-contract claim, as we have already discussed, one need establish the existence of a contract, the breach of a duty by the defendant, and resulting harm.<sup>153</sup> The plaintiff need not suppose any of these to be the case; she has first-hand knowledge of these facts—if they indeed exist—and may simply relate them to the court to state a claim. A copyright, patent, or trademark-infringement claim is not much different. To prove such claims, one has to establish ownership of a valid copyright, patent, or trademark and unauthorized use or copying thereof by the defendant.<sup>154</sup> Again, the plaintiff can outline a set of objective facts pertaining to ownership and unauthorized use that will fairly readily make the presumption of liability on the part of the defendant plausible, assuming the truth of the plaintiff's assertions.

Conversely, products liability, civil conspiracy, antitrust, and civil rights claims, for example, are more challenging to allege because each claim requires the proffering of a supposition of some sort to turn what happened

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152. For example, in the antitrust conspiracy context the Ninth Circuit requires the pleading of "evidentiary facts sufficient to establish a conspiracy," "such as a 'specific time, place, or person involved in the alleged conspiracies . . .'" *Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042, 1045, 1047 (9th Cir. 2008) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 565 n.10 (2007)). Other courts within the Ninth Circuit have similarly required pleading of the who, what, when, where, and how of an alleged anticompetitive agreement. *See, e.g., In re Late Fee & Over-Limit Fee Litig.*, 528 F. Supp. 2d 953, 962 (N.D. Cal. 2007) ("The complaint does include several conclusory allegations that the defendants agreed to increase late fees, but it provides no details as to when, where, or by whom this alleged agreement was reached."); *Int'l Norcent Tech. v. Koninklijke Philips Elecs. N.V.*, No. CV 07-00043 MMM (SSx), 2007 WL 4976364, at \*10 (C.D. Cal. Oct. 29, 2007) ("Norcent has not alleged any facts supporting its claim that the Group of 10 agreed not to sell video disc players that did not comply with the DVD standard. It has not alleged when the purported agreement was made. Nor has it stated who made the decision, how it was made or what the parameters of the agreement were.").

153. Many jurisdictions also impose the requirement that the plaintiff establish its performance under the contract.

154. *See, e.g., Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991) ("To establish infringement, two elements must be proven: (1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original.").

into an actionable event. In the products liability area the supposition is that the product at issue was defective. Only additional objective facts tending to show an unreasonable level of dangerousness<sup>155</sup> will validate the supposition, converting it into a supported implication.<sup>156</sup> Civil conspiracy claims depend on a supposition that the defendant entered into an agreement. Again, objective facts that support the notion of an agreement must be supplied.<sup>157</sup> It thus appears that if a claim places liability on occurrences or omissions for which objective facts make the implication of wrongdoing apparent, that claim will require less factual detail than a claim that depends on subjective motivations or concealed activities.

Here, then, we arrive at a response to one of the questions we posed initially: under what principle is the negligence complaint in Form 11 sufficient but an equally spare statement of a discrimination claim insufficient? The facts surrounding the assertion of negligence—the collision of the defendant’s motor vehicle with the plaintiff—bespeaks wrongdoing

155. A “defect” is ordinarily defined as anything that makes the product “unreasonably dangerous.” Determining whether a product is unreasonably dangerous is done with reference to an array of factors such as the likelihood that the product will cause injury, the probable seriousness of the injury, and the manufacturer’s ability to eliminate the unsafe character of the product without impairing its usefulness or making it too expensive. *See, e.g.,* *Effkay Enters. v. J.H. Cleaners, Inc.*, No. 07-cv-02521-LTB, 2008 WL 2357698, at \*6 (D. Colo. June 5, 2008).

156. For example, in *Effkay Enterprises*, 2008 WL 2357698, the court listed the following allegations:

[T]he cleaning chemicals were defective products because, among other things, they caused groundwater contamination even when used in their foreseeable and intended manner, they rendered water unfit for drinking even at extremely low levels, they were toxic to the liver, kidneys, and nervous system, they posed a significant threat to public health, and Katzson failed to provide adequate warnings of the known and foreseeable risks associated with the cleaning chemicals . . . .

*Id.* Similarly, in *Larsen-Anstine v. Shell Oil Co.*, No. 3:07-CV-290-M, 2007 WL 2079845 (N.D. Tex. July 19, 2007) the court listed allegations that established dangerousness:

Decedent was exposed to toxins and carcinogens, specifically benzene, as an ingredient, component or contaminant in JP-4 and other aviation gas (hereinafter “Jet Fuel”) manufactured, marketed, sold and/or supplied by Defendants. Decedent’s exposures to benzene-containing Jet Fuel were a legal cause of his leukemia and subsequent death on February 15, 2005. Defendants are liable in their capacity for manufacturing, selling, marketing, distributing, and/or designing Jet Fuel that was defective, hazardous and/or carcinogenic.

*Id.* at \*1.

157. A survey of civil conspiracy cases reveals a requirement that a complaint contain factual allegations pertaining to the who, what, when, where, and why of a conspiracy to state a sufficient civil conspiracy claim. *See, e.g.,* *Sung Tran v. Delavau, LLC*, No. 07-3550, 2008 WL 2051992 (E.D. Pa. May 13, 2008). As one court reasoned:

[The plaintiff] fails to identify the objectives, time and place of the conspiracy. He makes no allegations as to the roles of the defendants, and, with respect to defendants Delavau and Local 169, makes no allegations as to their culpable conduct, or even that they made any agreement with the other alleged co-conspirators.

*Id.* at \*11; *see also* *TracFone Wireless, Inc. v. GSM Group, Inc.*, 555 F. Supp. 2d 1331, 1336 (S.D. Fla. 2008) (“The Complaint contains detailed factual allegations of the Bulk Resale Scheme including the method, operation and duration of the scheme. The complaint further details defendant’s alleged misconduct and the location from which defendant operated the scheme. . . . Accordingly, the Court finds that the Complaint is sufficient to meet the pleading threshold of Fed.R.Civ.P. 8(a).”).

without need for any suppositions because, as we have said, such a scenario presumptively arises out of some type of wrongdoing. However, the facts surrounding the unadorned assertion of a discriminatory firing—the fact of the firing itself—does not have the same effect. The latter scenario is not presumptively wrongful but requires a supposition regarding the defendant's motivation.<sup>158</sup>

Although the dividing line is largely between claims that rest on objective and knowable facts and those that require suppositions about subjective motivations, states of mind, or concealed activities, our brief survey above raises the question of whether drawing the line in such fashion privileges private disputes such as the contract and negligence claims over more public-rights oriented matters like antitrust and discrimination claims. More study needs to be done across all types of claims to determine whether this suggestion matches reality. However, to the extent that pleading doctrine does have a bias in favor of private disputes or a bias against statutory claims or claims that bear somehow on the public interest—such as products-liability claims—that would be disturbing. Many of the claims falling within the latter category are important from a public-policy perspective because they exist to enable private citizens to enforce societal policy and regulatory interests such as free market competition, nondiscrimination, product safety, and environmental protection. Designing pleading doctrine in a way that frustrates such claims undermines the furtherance of the underlying policy goals and does so—as discussed above—in a way that is not sufficiently calibrated to assess potential merit. Perhaps substance-specific pleading reforms tied to various types of claims connected more with the public interest rather than mere private dispute resolution could be explored to permit such claims to progress at least to a point where judgments about their merit can be made with more confidence.

Finally, language from *Twombly* could support the idea that pleading standards also vary depending on a different kind of context than what we have been discussing thus far: the complexity and prospective cost associated with litigating the claim. The *Twombly* Court certainly made the cost of discovery relevant to its analysis, and lower courts that are so inclined may feel encouraged to do the same.<sup>159</sup> But I would argue that permitting context in this sense to influence the level of factual detail would not only be problematic in that it would render the doctrine even more subjective and

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158. Although distinguishing between a collision caused by negligence, recklessness, or intentional conduct requires some supposition of intent, the supposition is needed only to identify the degree of wrongdoing or culpability, not to establish whether wrongdoing of any kind occurred. Indeed, which among the several degrees of liability properly characterizes the defendant's culpability is not a matter readily accessible to the plaintiff at the pleading stage. Thus, Rule 8 countenances the pleading of each of these conflicting possibilities simultaneously as possible alternative theories. See FED. R. CIV. P. 8(d)(2) ("A party may set out two or more statements of a claim or defense alternatively . . ."); FED. R. CIV. P. 8(d)(3) ("A party may state as many separate claims or defenses as it has, regardless of consistency.").

159. E.g., *Limestone Dev. Corp. v. Vill. of Lemont, Ill.*, 520 F.3d 797, 803–04 (7th Cir. 2008) ("If discovery is likely to be more than usually costly, the complaint must include as much factual detail and argument as may be required to show that the plaintiff has a plausible claim.").

unpredictable,<sup>160</sup> but it would also be doctrinally unsound for such considerations to infect the analysis. Although plausibility may properly vary depending on substantive legal and factual context, whether discovery is expected to cost \$1 million or \$10 million does not, strictly speaking, bear on whether the plausibility threshold has been surpassed. If courts wish to weigh such cost considerations in the balance at the pleading stage, it would be more appropriate for the rules to make the propriety—and the means—of doing so more explicit.

### CONCLUSION

Pleading doctrine has been irreversibly modernized in the direction of attending more to the concerns of efficient judicial administration, a modification that was perhaps overdue. Indeed, the Federal Rules were crafted well before the rise of modern litigation, with its class actions and public-rights disputes, and prior to the advent of electronically stored information and the exorbitant discovery expenses that go with it. By embracing the standard of plausibility, the Court has refocused the threshold inquiry on the presence of facts that suggest liability; equivocal facts can no longer permit the invocation of discovery given its current costs. But getting past neutral facts to those suggestive of liability will be more difficult in those cases where suppositions about the defendants' subjective motivations or concealed activities are needed to overcome the presumption of propriety. When such information is unknown or unknowable from the plaintiff's perspective at the pleading stage, the doctrine is too unforgiving and unaccommodating, leaving plaintiffs with potentially valid claims with no access to the system. Recalibrating the doctrine to permit more generalized allegations of certain components of a claim, coupled perhaps with discovery reform that permits greater access to prefilng or staged discovery could go a long way toward restoring a proper balance between efficiency and access. In the meantime, I would urge courts to be conscious of the challenge that certain claims—particularly those of larger public-policy significance—face under contemporary pleading doctrine, and to find creative ways to use their managerial authority to give potentially valid claims their due before closing the courthouse door.

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160. See Ettie Ward, *The After-Shocks of Twombly: Will We "Notice" Pleading Changes?*, 82 ST. JOHN'S L. REV. 893, 909 (2008) ("If 'flexible plausibility' does not apply equally to all cases but depends on complexity, issue, and context, we are adding layers of complexity to what the Federal Rules drafters had contemplated would be a fairly simple and straightforward test.").